No.

In the

Supreme Court of the United States

OCTOBER TERM, 1960

EX PARTE

JAMES PIERCE AND RAYMOND J. BEALL

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF TEXAS

JAMES PIERCE and RAYMOND J. BEALL, union representatives fined and jailed by the District Court of Smith County, Texas, for picketing the entrance to a manufacturing plant of General Electric Company in a manner considered by the state court violative of an *ex parte* labor injunction, pray that writs of certiorari issue to review the Judgment of the Supreme Court of Texas rendered January 11, 1961, remanding your petitioners to the custody of the Sheriff of Smith County, Texas, until released according to the terms of judgment of the trial court.

OPINIONS BELOW

The orders of the District Court of Smith County, Texas, jailing and fining petitioners are not reported. They are appended hereto at pp. A-27 ff; 32 ff.

The Opinion of the Supreme Court of Texas, rendered January 11, 1961, denying writs of habeas corpus and remanding relators to the custody of the Sheriff of Smith County, Texas appears at *342 S. W. 2d 429*. It is printed unofficially at 4 Tex. Sup. Ct. Jrnl. 202; and is appended hereto at p. A-46.

JURISDICTION

The Opinion and Judgment of the Supreme Court of Texas remanding petitioners to custody was entered January 11, 1961. Motion for rehearing was denied February 15, 1961.[1] The jurisdiction of this court is invoked under 28 U. S. C. §1257(3), inasmuch as the District Court of Smith County, Texas, and the Supreme Court of Texas have denied petitioners' claims of rights and immunities under the Constitution and statutes of the United States.

[1]Petitioners are presently at large on bond inasmuch as the Supreme Court of Texas, on February 22, 1961, granted their Motion to Stay Writ of Commitment pending final action on petition for writ of certiorari to the Supreme Court of the United States. Sup. Tr. 63.

QUESTIONS PRESENTED

STATEMENT

Petitioners, each bearing a picket sign which truthfully proclaimed the existence of a labor dispute, stationed themselves on the public way (the shoulder of a public highway) on either side of a private road entrance to the General Electric plant with which they were in dispute. Petitioners thereupon walked back and forth across the entrance, passing each other near the center of the entrance. There were only two pickets. Their pace was deliberate, usually resulting in only one of the several cars seeking to turn into the entrance passing before the picket reached the opposite curb, turned, and retraced his steps. The picketing thus delayed by several seconds each automobile seeking entrance, and was a factor in the line-up of some 25 or 30 cars seeking entrance to the plant, each of which was delayed while a picket walked across the entranceway in front of it. The picketing was entirely peaceful. There were no threats. No one was touched. All who desired to enter or leave the plant did so.

QUESTIONS 1 AND 2

1.

Is a state court's jurisdiction to punish for engaging in such picketing pre-empted by the Federal labor laws?

2.

Does jailing a citizen for engaging in such picketing violate rights of free speech guaranteed by the First and Fourteenth Amendments?

3.

STATEMENT

Petitioners were jailed for the acts above set forth, which the state courts have held violative of the following three paragraphs of a fourteen paragraph *ex parte* restraining order which forbade:

> "(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants."
>
> "(2) Unlawfully delaying the entrances and exits of vehicles and persons into and from the premises of said General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas."
>
> "(7) Unlawfully obstructing the traffic on Highway 110 in front of the company's premises so as to create a menace and danger to the health and safety of citizens of this State traveling upon and using said State Highway 110."

The order to show cause why petitioners should not be held in contempt was in similar language.

QUESTION 3

Whether the above quoted language of the restraining order and the show cause order is so vague and undefined as to afford no fair warning of what conduct might transgress the commands of the order as to violate the due process guarantees of the Fourteenth Amendment.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pre-emption issue (Question 1, *supra*) involves the Taft-Hartley, Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U. S. C. §151 et seq., and Title VII of the Labor-Management Reporting and Disclosure Act of 1959; P. L. 86-257, 86th Cong. 1st Sess., 73 Stat. 519.

The Constitutional provisions involved are the First and Fourteenth Amendments.

STATEMENT OF THE CASE

During the course of a nationwide strike of General Electric plants which commenced October 2, 1960, the certified bargaining agent, Local 782 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, posted pickets at the entrance to the Tyler, Texas, General Electric Plant.

On October 14, 1960, during the course of the strike, General Electric presented its verified application for a temporary restraining order to the District Judge of Smith County, Texas, in chambers and without notice. The restraint issued *ex parte* (p. A-1, *infra*) in *haec verba* as sought by employer, prohibiting the International Union, its affiliated Local 782, twelve named individuals, and "all striking employees" from "placing vehicles so as to constitute an obstacle to the free ingress and egress of (sic) the

company's premises * * * striking or hitting with picket signs or other objects carried by the pickets, vehicles entering and leaving the company premises * * * threatening violence * * *provoking violence * * * harassing and intimidating employees * * * picketing or attempting to picket homes or private residences of the working employees * * * threatening or coercing working employees * * * by telephonic communication * * *. In any manner unlawfully interfering with the normal operation of the company's properties and in the conduct of its business * * *. Committing acts of destruction or in any manner damaging any of the vehicles entering or leaving the premises * * * molesting, intimidating, threatening or inflicting physical violence * * * etc."

In addition to the proscriptions above summarized, the restraining order in paragraphs (1), (2), and (7) forbade the following acts:

> "(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants.
>
> "(2) Unlawfully delaying the entrances and exits of vehicles and persons into and from the premises of said General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas.
>
> "(7) Unlawfully obstructing the traffic on High way 110 in front of the company's premises so as to

create a menace and danger to the health and safety of citizens of this State traveling upon and using State Highway 110."

On October 19, 1960, employer's plant manager filed two affidavits for contempt (p. A-8; A-13, *infra)* charging that Pierce and Beall were each guilty of contempt in that (Tr. 46; 51-52)[2]:

"(1) He did on October 17, 1960, unlawfully obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed;

"(2) He did on October 17, 1960, unlawfully delay the entrances and exits of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas;

"(3) He did on October 17, 1960, obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises;

"(4) He did on October 17, 1960, unlawfully obstruct the traffic on State Highway 110 in front of the Company's premises so as to create a menace and danger to the health and safety of the citizens of this State traveling upon and using State Highway 110;"[3]

[2]The following references are used throughout this Petition: "Tr." is the Transcript of the pleading in the District Court (original on file here pursuant to order of Court); "S. F." is the Statement of Facts which reports the testimony in the District Court. "Sup. Tr." is the Transcript of the Record certified by the Clerk of the Supreme Court of Texas.

Relators filed answers denying contempt, challenging the state court's jurisdiction as pre-empted by federal labor statutes, asserting that the activities of which they were charged were peaceful picketing protected by constitutional guarantees, and challenging the restraining order and contempt charge for ambiguity (p. A-19). The further defense was interposed (pp. A-24-25):

> "These defendants interpreted said order to permit peaceful picketing on the public way at the point where the private driveway into plaintiff's plant intersects with State Highway 110. These defendants picketed on October 17, 1960, on the public way adjacent to the entrance of plaintiff's plant and across the intersection of the highway and the drive into plaintiff's plant. Neither defendant picketed across the highway. All picketing was on that part of the highway which constituted the shoulder of the highway and across the entrance to plaintiff's plant. These defendants continued walking across such entrance in an orderly and peaceful manner carrying picket sign advertising the facts of the labor dispute. Such picketing in some instances delayed individual automobiles' ingress and egress from the plaintiff's plant as much as ten or fifteen seconds while the picket walked in front of said vehicle. Such delay is not unreasonable. Indeed, defendants have constitutional rights to picket which they exercised without intention to violate the orders of the Court, and these defendants believed that in said picketing and in all their activities that they were acting within their rights and in accordance with the orders of this Court and these defendants had no intention of violating the orders of this Court."

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[3]This paragraph was included only in the notice relating to Pierce. Tr. 52.

After trial to the judge, without the intervention of a jury,[4] the state district court found both Pierce and Beall guilty of contempt, viz (Tr. 77 as to Beall; Tr. 83-84 as to Pierce):

> "(1) He did on October 17, 1960, unlawfully obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises then picketed:
>
> "(2) He did on October 17, 1960, unlawfully delay the entrances and exits of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas;
>
> "(3) He did on October 17, 1960, obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises;
>
> "(4) He did on October 17, 1960, unlawfully obstruct the traffic on State Highway 110 in front of the Company's premises so as to create a menace and danger to the health and safety of the citizens of this State traveling upon and using State Highway 110."[5]

On the basis of the above conclusions the District Judge imposed a three day jail term on Pierce, a two day jail term on Beall and fined each $100.00, the maximum permitted by Article 1911, V.R.C.S., which empowers a Texas Court to punish for contempt "by a fine not exceeding $100.00 and by imprisonment not exceeding three days."

---

[4]Under Texas procedure those charged with contempt are not entitled to jury trial. See 12 Tex. Jur. 2d 527; "Contempt", § 49 and cases there cited.

[5]Paragraph 4 is contained only in the order as to Pierce. (Tr. 84.)

Upon being jailed, relators presented Ex Parte Application for Writs of Habeas Corpus to the Supreme Court of Texas. These were provisionally granted, but upon final hearing were denied by Opinion dated January 11, 1961, reported at 342 S. W. 2d 424, pp. A-46—A-57, infra.

The Undisputed Facts

The Opinion of the Supreme Court of Texas does not fully state the facts. Our claims to constitutional right have been denied by recitals of half-fact, quotations of testimony out of context, and failure to note undisputed fact and admissions made by adverse witnesses (p. A-46 at A-54 ff, *infra*). Accordingly, we respectfully call upon this Court to exercise its "power to search the records in the state court • • •" for "• • • it is of prime importance that no constitutional freedom • • • be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, 312 U. S. 287, 293.* When the undisputed relevant facts are noted the following appears:

A.

Service of the Restraining Order—Efforts to Interpret It

The restraining order was served on Beall (the officer of Local 782), S. F. 219ff. while Pierce (the International Union representative) was at General Electric headquarters in the East trying to settle the strike, S. F. 226. Beall confessed to being "a little frightened" by the order which he did not understand (S. F. 272). So he sought help; his long

distance call to the president of the Texas AFL-CIO resulted in recommendation of counsel in Dallas. Pierce and other union officers came that night to Dallas where they consulted counsel (S. F. 228ff.) and asked "what we could and could not do under this Restraining Order" (S. F. 229). They were advised that the restraint did not forbid picketing, but as to the manner of it to recheck with the Sheriff and highway patrolman, and to follow whatever advice or instruction the peace officers gave (S. F. 229). Pierce did so. Cars were parked at points as directed by highway patrolmen. Picketing was continued in the view of eleven highway patrolmen who were present in front of the plant (S. F. 229ff; 238ff.). No one suggested that the picketing was being improperly conducted (S. F. 239; 44; 52; 63).

B.

The Union Meeting

The Texas court's opinion infers contumacious intent from statements attributed to relators at a union meeting held immediately prior to the questioned picketing (p. A-56, *infra*). But the undisputed evidence, ignored below, shows the following with respect to that meeting:

A union rally (which had been scheduled long before the restraint issued, S. F. 271) was held on a vacant lot owned by the union which is located across the highway and about one quarter of a mile south of the General Electric plant. In the course of this rally Pierce spoke several times explaining the restraining order, branding the procedure of its issuance one-sided and unfair, and expressing his pique

at the issuance of the order without notice and without so much as a check with peace officers who could have vouched for the peaceful and lawful nature of the picketing. S. F. 232ff; 257ff. The meeting otherwise consisted of addresses by representatives of other labor organizations expressing their support of the strikers (S. F. 185, 234). Pierce made clear that although he thought the restraint improperly issued, *it had to be obeyed* (S. F. 234, 264; 314). Pierce was specific in his advice; S. F. 264:

> "A. I told those people that that should be obeyed at all cost.
>
> "Q. Did you go on and expand or explain that at all? And if you did, please tell the Court what you said about it.
>
> "A. Yes, sir, I said that we should go strictly by the Restraining Order, that we should go out of our way to see that nothing happened. I told them that if a person were to walk up and hit them in the face on the picket line, that they should stand there and not lift a hand * * *."

Employer's witness, Connor, while asserting that Pierce referred to the Court's Order as "a piece of trash", and the judge as "bought and paid for by General Electric" (S. F. 25), admitted that Pierce "*admonished the crowd to obey the fourteen points in the restraining order*" (S. F. 314). (Emphasis added.)

The meeting ended with Pierce's statement that he was going to picket lawfully (S. F. 334, 335). He proceeded with James Smith, a representative of the Steelworkers union from Longview, to the entrance to the G. E. property and commenced picketing. S. F. 187-188; 236ff.

C.

The Plant Layout—General Electric Activities—Highway Patrol, Traffic Control

Before detailing the manner of the picketing, we describe the context in which it was conducted. The General Electric plant property is on the north side of State Highway 110, several miles east of Tyler. The plant is far enough out of the populated city area that all employees drive, rather than walk, to work. A plat of the property is in evidence, Exhibit 2, S. F. 339. The highway right-of-way is 130 feet wide, the pavement 40 feet wide. The plant is reached by employees from Tyler by driving their automobiles in an easterly direction on Highway 110, then turning left across on-coming traffic, and proceeding north on the 22-foot wide private driveway of the Company. A lesser number of employees drive from the east to the west, i.e. from Whitehouse or Troup, and turn right onto the G. E. driveway without crossing the oncoming lane of traffic. S. F. 42ff.

There are two gates or entrances into the G. E. property. Only one is normally kept unlocked. General Electric made no effort to use the second gate, because Austin, Manager of Employee and Community Relations, explained that they did not want to give the employees a second place to picket. S. F. 312, 313.

Not only did G. E. fail to open the other available gate, but more important, it took steps clearly calculated to assure a traffic pileup at the single open entrance. The conventional reporting time of employees is staggered, begin-

ning at 7:00 A.M. and ending at 8:00 A.M. But General Electric, on the day it obtained the *ex parte* order, notified all employees that as of October 17, all employees were to report at 8:00 A.M. S. F. 72-73, 113; 167ff. Thus the 250 office and non-striking production employees, plus supervisors and executives, all converged on the plant at 8:00 A. M. By far the greatest number of these were coming from Tyler, and thus were required to turn left across the highway.[6] Of course both common prudence and the law of the road required these vehicles to stop before entering the G. E. drive.[7] S. F. 43.

Such congestion at a single gate was sure to clog traffic. It did so.[8] But, fortunately, Pierce had previously conferred with highway patrol officers and the sheriff,[9] S. F. 218, and as a result, there were eleven highway patrolmen in the area. When traffic became heavy, high-

[6]Plaintiff's property boundary marker as originally placed would have required pickets, if they were to remain on *public* property, to picket almost on Highway 110. But Pierce, after ascertaining the 30-foot highway right-of-way, carefully measured 65 feet north from the center of the highway and marked this point on the G.E. driveway. By remaining close to this mark pickets were about 1½ to 2 car lengths further from the highway traffic than they would have been had they observed the original, improperly located, company marker. Thus the point at which pickets stationed themselves resulted in less likelihood of slowing traffic than if they had located in relation to the employer's marker. S. F.—

[7]Note that according to Beall's undenied testimony there is a traffic clog even when employees report at staggered shifts and there is no picketing. S. F. 41; 295-296; Cf. Sproule 170. Thus the day of the contempt hearing (after the strike was over and the picketing had ended) there was a twelve-car traffic jam at the plant entrance at reporting time.

[8]On the morning of October 17, the G.E. movies show six cars backed up toward Tyler to the point that the patrolmen began directing traffic, and 12 to 24 cars waiting thereafter. (Ex. 11) Cf. S. F. 192; 189; 38; 45.

[9]We are unable to specify by record reference what occurred between Pierce and the highway patrolman because the trial court would not hear it. S. F. 218; compare 266-267.

way patrolmen commenced directing the traffic by hand signal, S. F. 189, in a manner similar to that by which traffic is directed after any large social or sports event which overtaxes the highway facilities. S. F. 43-44.

It was in this context that the alleged contemptuous picketing took place.

D.

The Picketing—October 17—Morning

Upon leaving the union meeting at about 7:15, the morning of October 17, Relator Pierce and Jim Smith proceeded to the north shoulder of the public highway #110 at the intersection of the G. E. driveway, and thereupon commenced picketing. The picket signs were 16 x 24 inches reading:

"Local 782, IUE-AFL-CIO
ON STRIKE
against General Electric"

Each picket (there were only two), starting from the driveway curb and crossing the other picket in mid driveway, proceeded to the opposite driveway curb. Having reached the other curb, each picket turned and reversed his direction. Admittedly the picketing was at a deliberate pace (S. F. 63)—no effort was made to hurry—although pickets did observe and follow hand signals indicated by the highway patrolmen who were directing traffic (S. F. 239). Although plaintiff took ten thousand feet of movie film, and introduced 1000 of this in evidence (Exhibit 11), there is no showing of a single instance where a picket failed to obey

a signal by a patrolman directing traffic.[10] No threats were made. No violence occurred. Not a finger was laid on anyone. There was not even conversation between pickets and those crossing the picket line. As every plaintiff witness admitted, "everyone who desired to enter the plant did so." (S. F. 73). Plaintiff's own witnesses characterized the picketing as "orderly and pleasant" (S. F. 31). Police officer Nolan, plaintiff's witness, observed the picketing to be "peaceable". S. F. 40. The following is officer Nolan's description of the picketing:

"Q. Now, what were the pickets doing?

"A. They were walking in this area right across here.

"Q. Walking across five or six feet north of the stop sign, walking across the driveway, and then back across again? Is that correct?

"A. Correct.

"Q. Did they ever, to your observation, stop in front of a vehicle?

"A. No, sir.

"Q. They kept walking all of the time?

"A. Yes, sir.

"Q. How many of them were there?

"A. There were two.

"Q. Only two at a time?

"A. Yes, sir."

[10] Plant Manager Sproule's assertions of such failures not only lacked specificity (S. F. 176-177), but were belied by plaintiff's own movies. See Exhibit 11.

Plaintiff's witness, Patrolman Arnold, testified; S. F. 62-64:

"Q. Now, was everybody orderly there as far as you observed?

"A. Who are you speaking of?

"Q. Anybody. Did you see anybody make any threats or any ugly gestures or talk mean to anybody, or lay a finger on anybody, or anything like that?

"A. No, sir.

"Q. And they walked from one side of the driveway to the other?

"A. Yes, sir.

"Q. And as they would get to one side of the driveway, a car would come through, or perhaps two cars, and then they would walk back the other way and another car would perhaps be held up for a few seconds?

"A. Yes, sir.

"Q. Did anything more than that happen? If it did, tell the Judge about it.

"A. Well, our main concern was the traffic problem, and the pickets walked so slow in front of the cars that it allowed the cars to stack up on the highway.

"Q. Did you ask the pickets to walk any faster?

"A. No, sir, I did not.

"Q. As a matter of fact, the only traffic control that you exercised was to hold the traffic coming in a westerly direction from Troup, or what's that other town—Whitehouse, from Troup or Whitehouse coming back toward Tyler, isn't that right?

"A. Yes, sir.

"Q. And when you held that traffic long enough for cars to turn left into the plant, the thing worked itself out very promptly, did it not?

"A. Yes, sir.

"Q. Was anybody even late to work that morning?

"A. I don't know.

"Q. If they were, they didn't make any complaints to the Highway Patrol about it?

"A. Not to my knowledge."

Even with the intentionally compounded delay flowing from G. E.'s change of staggered shifts to a single reporting time, and despite failure to open a second available gate, the more than 300 employees reported for work. As all admit: every person who desired to enter the plant did so (S. F. 32; 44-5; 64; 73; 117.)

E.

The October 17, Picketing—Afternoon

Shortly after 4:00 P.M., Relators Pierce and Beall commenced picketing in similar fashion to the morning picketing. Traffic leaving the plant is controlled by a "Stop" sign requiring all traffic to stop before it enters highway 110. Normally all employees have left the plant by seventeen minutes after the hour. S. F. 305. On this occasion, with all employees off at one time instead of the usual staggered quitting time, it was not until 35 to 40 minutes after quitting time that all employees had left (S. F. 308). Some of this delay was due to the longer drive required to exit from

the more distant parking facilities which the company required during the strike, S. F. 308, and Defendants' Ex. #2.

As in the morning picketing there was neither threat nor violence. Pickets were polite to those who crossed their line. S. F. 111, 133. There was some jocular banter between pickets and those who drove past. S. F. 240; 274-5. Pierce and Beall crossed the driveway at a deliberate pace, though on two or three occasions Beall reversed his direction prior to reaching opposite curb, and on one occasion reversed his direction twice.[11] Employer's movies make quite clear that there was a good deal of good natured kidding in connection with the afternoon picketing, bowing to the occupants of automobiles—sometimes in a somewhat mock grandiose fashion—and smiling and talking back and forth. The motion pictures indicate that all this was done (and taken by the occupants of the cars) in good humor, almost in holiday festive manner. This picketing continued for less than an hour (S. F. 273), after which other pickets relieved Pierce and Beall. Neither General Electric, nor peace officers, nor anyone else made any complaint to the pickets or the Union officials as to the picket's conduct. S. F. 44, 191, 211, 269, 238-242; Cf. S. F. 77; 97-98.

Picketing continued under surveillance of both company officials and peace officers without complaint until October 19, 1960 when the contempt affidavits were filed.

[11]The movies, which admittedly record the most gross delays (S. F. 157), also show that on two occasions Beall stopped and reached to rub his leg while in mid-driveway, and on one occasion dropped his picket sign. Pierce partially dropped his sign, but recovered it immediately and did not stop or reverse direction. See movie film, Exhibit 11.

F.

CONCLUSIONS AS TO THE FACTS

The Texas Courts have held that the record disclosing the above events shows unlawful obstruction, unlawful delay, unlawful obstruction of traffic. (A-30; A-35; A-51, *infra)*. We have set forth the facts as shown by the whole record at such length so that this Court could see that the *ONLY DELAY OR OBSTRUCTION IS THAT INCIDENT TO THE PEACEFUL PICKETING AT A DELIBERATE PACE ON THE PUBLIC WAY ACROSS THE ENTRANCE TO THE STRUCK PLANT.* The pickets, by effecting a deliberate pace, walked in front of each car entering the plant. As the Texas Supreme Court noted: (A-54, *infra*):

> "There is testimony that the pace of Pierce and the other moving picket was so slow and deliberate as to back up some 25 or 30 automobiles approaching from Tyler and intending to enter the plant premises; that the interval between the crossing of the pickets and their return was so brief that only one automobile could pass; that highway patrolmen were forced to hold up traffic traveling in a westerly direction to permit turning of the slow-moving traffic across the north lane of the highway and into the plant entrance; that 'the traffic coming from Tyler was blocked considerably'; that there was a similar slowdown of automobiles leaving the plant at the end of the work day; that 'the vehicles were held up repeatedly, both before and after 8:00 A.M.'"

The only obstruction or delaying at issue is that which is incident to pickets walking in front of a car entering a struck plant. As we develop *infra*, p. 24-27, we assert that

the right-to-picket encompasses the right to have the public read and understand the picket sign, and that the few seconds delay required for a picket to interpose a picket sign in front of each car entering a struck plant is not unlawful delay or obstruction, but is a lawful and necessary concommitant of the right of publication.

How Federal Questions Presented

Each of the federal questions (pre-emption, free speech, and denial of due process) was raised in the trial court by "Defendants' Response to Show Cause Order, Tr. 54; and Response of Defendants to Notice and Affidavit for Contempt, Tr. 70. The same issues were raised in the Petition for Writs of Habeas Corpus addressed to the Texas Supreme Court (p. A-39 at 42; 43, *infra*).

The Opinion of the Supreme Court of Texas shows on its face that these federal questions were considered by that Court. (See pp. A-46 at 48; 51; 52, *infra*).

Each of these questions was reurged in Motion for Rehearing in the Supreme Court of Texas, p. A-61-63, *infra*).

REASONS FOR GRANTING THE WRIT

A.

Pre-emption

The Supreme Court of Texas has decided a federal question (pre-emption) in conflict with application decisions of this Court, particularly *Youngdahl v. Rainfair, 355 U. S. 131, 2 L. Ed. 151, 78 S. Ct. 206. Youngdahl* forbade a state court to enjoin peaceful picketing. The instant

case jails relators for performing the very acts which this Court in *Youngdahl* held were not subject to state restraint.

We do not urge preemption of the restraint as written insofar as it specifically enjoins threats, violence or other matters within state competence (p. 6, *supra*). The attack is upon the restraint *as interpreted and applied in the contempt proceeding*. The restraining order by its terms does not ban picketing. It was admitted that picketing was not prohibited.[12] Paragraph (5) of the restraint, by its proscription against "more than two (2) pickets at any time within 50 feet of an entrance * * *" implies the propriety of two or less pickets. Thus in banning the illicit, while preserving the right to picket, the restraining order did exactly what this Court in *Youngdahl* indicated was as much as a state court could do, viz: "the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union." *355 U.S. at 139*. Yet this Court was there at pains to hold: "Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers, and the union, *yet it*

[12]Plaintiff's attorney repeatedly advised the trial court: "* * * *we have certainly never denied the right to peacefully picket. That is not an issue in this case at all.*" S. F. 217. The order does not *per se* restrain picketing. The only "obstruction" proscribed is that which is done "unlawfully." Plaintiff recognized that "the picket had the same right to use the street as the General Electric Company had" S. F. 175; and reiterated that union members had a right to carry a sign, and plaintiff had no "objection to anyone picketing." Relators were assured in the course of the trial that they were not charged with the act of picketing as constituting a contempt of court, viz: (S. F. 33)

"MR. WELLS: Do you mean, Counsel, that you are charging that the act of picketing constitutes contempt of this Court?

"MR. FLOCK: No, sir."

is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners. 355 U. S. at 139; 2 L. Ed. at 157.

The Texas' Court's twisting of an order which permitted peaceful picketing into proscription of picketing is an unlawful state invasion of the federal domain. *Youngdahl* specifically so held. What the Texas courts have done is to twist the restraint which, as issued, conformed to this Court's *Youngdahl* rule, and to "interpret" the order to do just exactly what this court in *Youngdahl* held to be beyond a state court's power. There the Arkansas Supreme Court had prohibited all picketing, *226 Ark. 80, 288 S. W. 2d 589.* But this Court vacated the injunction insofar as it forbade peaceful picketing, viz: "* * * to the extent the injunction prohibits all other picketing and patrolling of respondent's premises and in particular prohibits peaceful picketing, *it is set aside. 355 U. S. at 140; 2 L. Ed. at 157.* Emphasis added.

The Texas Court's opinion thus turns *Youngdahl* upside down and backwards when it states that *Youngdahl* authorizes the instant restraint. Actually, it holds the exact contrary.

On this contempt proceeding there is no evidence of violation of those portions of the restraint with respect to violence or other matters within state competence under the *Youngdahl* decision, except that peaceful picketing (an activity which is protected by Section 7 of the Federal Labor Management Relations Act and which the state has

no power to ban) resulted in some delay of ingress and egress, and to some obstruction of the entrance. But an order which bans "obstruction" while permitting peaceful picketing, necessarily implies that obstruction which flows from picketing is not banned. While the Texas court recognized as much when issuing the initial restraint (for it banned only "unlawful" obstruction) on contempt it otherwise construed its powers to ban all obstruction—even that incident to lawful picketing. So construed the order is beyond the power of the state court, for the federal statute protects as a lawful "concerted activity" the peaceful picketing here shown. *Youngdahl, supra* and Section 7 of the federal labor law, *29 U. S. C., §157.*

B.

Free Speech

Punishment of union member for peaceful and truthful publication of the facts of a labor dispute by means of peaceful picketing unaccompanied by violence or threat, (and in circumstances where all who wish to enter the struck premises do so) is violative of First and Fourteenth Amendments rights. *Thornhill v. Alabama, 310 U. S. 88; 60 S. Ct. 736; 84 L. Ed. 1093 (1940); Chauffeurs etc. v. Newell, d/b/a El Dorado Dairy, 356 U. S. 341, 78 S. Ct. 779, 2 L. Ed. 809 (1958).*

Here, as in *Cafeteria Employees v. Angelos, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58 (1943)* "Right to free speech • • • cannot be forfeited because of disassociated acts of past violence (citing cases). Still less can the right

to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing."

Nor is it basis for jailing a citizen that his picketing was "slow and deliberate" or that "the interval between the crossing of the pickets and their return was so brief that only one automobile could pass (at a time)" and a resulting "slow down of automobiles" entering or leaving. (*342 S. W. 2d at 429*, p. A-54-55, *infra*).

The courts below, while ostensibly recognizing the right to picket, hold that when its exercise delays those who observe the picket sign it becomes unlawful. This view obliterates the right to picket. For either the physical presence of the picket, or the delay inherent in the viewers stopping to read the sign requires some interruptions of normal movement. When a delay of the ten seconds or so required for each entrant to a gate to view the sign is multiplied in a context of many cars funneled through a single gate it may well result in a delay of several minutes, or a line of cars which is normally twelve to fifteen may extend to twenty-five or thirty.

But if the right to picket may be limited because it takes a few seconds for auditors to get the message, then there is no right to picket. Speech is more than talk in a vacuum. Speech is nothing unless it means some reasonable opportunity for auditors to hear. The broadcast of a picket's message is nothing unless it includes a reasonable opportunity for the public to view the message.

This Court in *Thornhill* recognized "that effective exercise of the means of advancing public knowledge may persuade some of those reached * * *." *310 U. S. 88, 104.* Yet it was the *effective exercise* of the right which was held protected by the constitution. Here the "effective exercise" by workers in communicating a lawful message has resulted in jail and money fine.

Pickets and non-strikers, motorists and pedestrians, all have rights to use the public way. A state may provide rules for accommodation of the various uses to which these may put the public road. But a state may not, as here, deny the use of public way to a particular class (pickets) on the ground that their use of the road interferes with others' use. For any lawful use constitutes some deprivation of right of conflicting use. That is the reason for traffic lights, cross-walks, and other means of accommodation of the many who use the public way. Pickets have just as much right to parade with signs on the public road as do General Electric executives and non-strikers to drive their vehicles upon it. Pickets, as pedestrians, have rights vis-a-vis motorists.[13] Right-of-way is controlled either by position in cross-walk, or, as here, by traffic control exercised by state highway patrolmen directing traffic. Obedient to this traffic control, the pickets enjoyed the privileged position of right-of-way vis-a-vis drivers of motor vehicles. Lawfully on the public way—they had the right to carry banners, and to interpose them before

[13] Cf. Article 6701(d), Tex. Rev. Civ. Stats., particularly at §§15; 77(a); 79; 92.

those who entered. The delay incident to receiving this message is no basis for punishment.

If the punishment here is permitted to stand every picket in America is vulnerable. For delay is inherent in observing and reading a picket sign—perhaps even in deciding whether to be influenced by it. If Pierce and Beall may be jailed for causing delay, every picket is in jeopardy, and the right to picket is gone.

C.

Due Process

Restraint against "unlawfully delaying * * *" and "unlawfully obstructing * * *" is so vague as to be beyond common understanding, and this denies due process. Particularly in the context of the instant order which enjoined "striking and hitting * * * vehicles entering and leaving * * *; threatening violence * * * etc." (see p. 6, *supra*), and limited pickets to not more than two within a specified area,[14] it would appear that peaceful picketing was not banned. General Electric's counsel so conceded, p. 22, *supra*. Yet the contempt charge and finding result in fine and jail term solely because of picketing which the state courts hold to have violated proscriptions against "unlawfully delaying" and "unlawfully obstructing."

[14]Paragraph 5 of the Restraining Order forbade:
"(5) Unlawfully placing more than two (2) pickets at any time within fifty (50) feet of an entrance to the Company's premises or placing more than two (2) pickets within fifty (50) feet of other pickets.

The General Electric management did not itself understand the restraint it had induced the Court to issue.[15]

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[15]Plant Manager Sproule admitted as much, viz. S. F. 179ff:

"Q. Did you read the Application for Restraining Order before you signed it?

"A. Yes, sir.

"Q. You understood that you were asking for some kind of a limitation on the actions of various members of the Union?

"A. Yes, sir.

"Q. Now, with respect to pickets, did you understand that from your reading and knowledge of that document, that you were in any wise restricting the right of those persons picketing?

"A. No, sir.

"Q. And as long as they kept moving on the public way with the signs, you had no intention of impeding them from doing that in any way?

"A. Yes, sir.

"Q. Oh, you did?

"A. Yes, sir.

"Q. Well perhaps I don't understand that.

"A. Perhaps I didn't understand the question, sir.

"Q. Did you have an intention of moving pickets off of a public way?

"A. No, sir.

"Q. Did you have any intention in obtaining this restraining order in requiring pickets to be on the public way only at particular times?

"A. No, sir.

"Q. Well, is it a matter then of pickets not walking fast enough, or walking in the wrong place, or what is it in your view, that is restrained with respect to the pickets?

"A. You asked the questions as to whether I thought lawful picketing consisted of a man keeping moving. I think it consists—and this is Sproule opinion now—this is not law opinion, I assure you. Sproule opinion means that a man has to do more than move at a snail's pace to do lawful picketing. That is my view.

"Q. As I understand your position then, it is that the pickets should move faster than the picket moved?

"A. Well, I don't feel that I am capable of interpreting the law. I gave you my interpretation.

"Q. Well, you obtained a Restraining Order here which you are requiring certain of your employees to interpret. What I am trying to discover is what the draftsman of the request, how it is interpreted by the person who made the request. You are the person who signed the Application for a Restraining Order, as this record shows.

"MR. ELOCK: Your Honor, the Injunction speaks for itself.

"THE COURT: Yes, I will rule that the Restraining Order does speak for itself. His interpretation would cast no light on the legality or what it means. I will sustain the objection.

"MR. WELLS: Note our exception, Your Honor.

(Continued on next page)

It would appear from the face of the restraint that the district court was permitting "obstructing" and "delaying" to some extent, so long as such conduct was not "unlawful". But pickets, at their peril, were forced to determine the standard of "lawfulness" applicable, because the court had not given any guidelines to indicate the exact conduct proscribed.

Pickets were left to speculation and conjecture as to what delay was "unlawful". How many seconds must a car be delayed by pickets who are peacefully crossing the public way before there is an "unlawful" obstruction or delay? Is compliance by pickets with all instructions of a traffic officer present at the picket line sufficient to render delays incidental to deliberate and peaceful picketing lawful? What pace is required? May pickets cross the roadway, or must they stand at its side, hoping that a sideway glance may result in those who are entering getting their message. In the course of a day's picketing the record shows that on *two* occasions Beall stopped and reached to rub his leg while in mid-driveway, and on one occasion dropped his picket sign, and immediately picked it up. How was he to know such activity would subject him to jail and money fine?

(Continued from preceding page)

"Q. Did you time any particular cars in or out of the premises of the Company on the 17th?

"A. No, sir.

"Q. Your Affidavit in Contempt speaks of that he did 'Unlawfully delay'. I take it you are not in position to tell the Court what you meant by unlawfully delay there, whether five seconds or a minute or an hour?

"A. No, sir.

"Q. If I understand your testimony now, your only complaint with reference to peaceful picketing was that it was conducted at too slow a pace. Is that correct?

"A. I don't feel I am capable of interpreting all of the laws of the State of Texas. I thought that there was a violation of the picketing laws, and therefore I filed a Complaint."

Many more such queries arise from the broad, vague and ambiguous language of the order. Injunction against unlawful obstruction leaves the door open for controversy, both as to what is obstruction and as to what is unlawful. Defendants are left to guess at what they are forbidden to do.[16]

The Supreme Court of Texas, while citing cases recognizing that picketing is privileged and beyond the power of proscription by a state court, and noting that the trial court's order does not in so many words ban picketing, "interprets" the restraint *(post facto)* to add "unreasonably" to the "unlawfully" written in the trial court's order.[17] How is a picket to gauge "unreasonable" delay? Other Texas Courts permit rail trains to block a highway for five minutes. *Deramus v. Thorton, 333 S. W. 2d 824 at 825.* Is it then "unreasonable" for a picket to delay for a few seconds?

Here, as in *Swift & Co. v. United States, 196 U. S. 375, (1905)*, "the defendants ought to be informed as accurately as the case permits what they are forbidden to do." Here, as there, a sweeping injunction to obey the law runs afoul "the first principles of justice not to sanction a decree so

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[16]See "Through the Looking Glass" by Lewis Carroll, Heritage Press, New York, (1941), page 112:

"I don't know what you mean by 'glory'," Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there is a nice knock down argument for you'."

"But 'glory' doesn't mean 'a nice knock down argument'." Alice objected.

"When I use a word" Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is" said Alice, "whether you can make words mean so many different things."

"The question is", said Humpty Dumpty, "which is to be master—that's all."

[17]The opinion now advises that: "any conduct by pickets * * * which *unreasonably* delayed the entrances and exits of vehicles * * * was unlawful in the sense that it was conduct which the courts would not countenance or permit." See 342 S. W. 2d 424 at 428; pp. A53, *infra*.

vague as to put the whole conduct of the defendants * * * at the peril of a summons for contempt." *196 U. S. at 401.* More recently this court has held: "A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them." *Raley v. Ohio, 360 U. S. 423, 438.* "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States v. Cardiff, 344 U. S. 174, 176.* A person cannot be convicted of being on the wrong side of a line if the bounds fixed by the statute are too blurred to identify an ascertainable standard of conduct. *International Harvester Co. v. Kentucky, 234 U. S. 216, 221-224.* And so "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co., 269 U. S. 385, 391.*[18]

CONCLUSION

Questions as to whether picketing activity, heretofore uniformly held pre-empted to federal tribunals, (and subject both to constitutional protections guaranteeing freedom of communication and specific protection as a lawful "concerted activity" within the protection of Section 7 of the Federal Labor Management Relations Act) may be the subject of state court punishment as violative of an un-

[18] See also, *Winters v. New York*, 333 U. S. 507; *Lanzetta v. New Jersey*, 306 U. S. 451; *United States v. Cohen Grocery Co.*, 255 U. S. 81.

bounded restraint against that which is "unlawful" have been answered by the Texas courts to permit jailing of those who walk peacefully on the public way with a banner. Unless this Court reviews, serious intrusion upon petitioners' basic First and Fourteenth Amendment rights will have been accomplished. More important, unless the case is reviewed, "the workingman's means of communication" is left without protection in states where a local judiciary either does not understand, or is not sympathetic with these traditional and wholly lawful methods of industrial competition.

This case means more than fine and jail time to Pierce and Beall. It means more than giving General Electric an excuse for firing Beall. It means that the only effective method by which laborers may enlighten the public on the nature and causes of a labor dispute is gone.

Accordingly, we respectfully urge that writ of certiorari issue to review the decision of the Texas Courts.

L. N. D. WELLS, JR.,
1601 National Bankers
Life Bldg.,
Dallas 1, Texas,

BENJAMIN C. SIGAL,
1126 16th Street, N.W.,
Washington 6, D. C.,
Attorneys for Petitioners, James Pierce and Raymond J. Beall.

April 10, 1961.

Of Counsel:
MULLINAX, WELLS, MORRIS & MAUZY,
1601 National Bankers Life Bldg.
Dallas 1, Texas.

Order Granting Temporary Restraining Order & Setting Hearing on Temporary Injunction

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No. 60-739

GENERAL ELECTRIC COMPANY

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *et al.*

In the 114th Judicial District Court of Smith County, Texas

The application of GENERAL ELECTRIC COMPANY, Plaintiff for temporary restraining order upon its verified Petition, having been presented to me, Judge of the 114th Judicial District Court of Smith County, Texas, without notice to the Defendants, on this 14th day of October, 1960, and it clearly appearing from the specific facts set forth in said verified Petition that immediate and irreparable injury, loss and damage will result to Plaintiff before notice can be served upon Defendants and a hearing had on Plaintiff's application for such restraining order, unless Defendants, and each of them, is forthwith restrained as prayed for in Plaintiff's said Petition, in that Defendants, jointly, concertedly, and severally are engaging and are threatening to further engage in certain unlawful acts in that Defendants'

pickets are obstructing the free ingress and egress of vehicles into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas, and are preventing the free passage of vehicles, resulting in unreasonable delay in obtaining lawful entrance and exits therefrom; certain members of the Union are deliberately placing their vehicles upon Highway 110 directly in front of the picketed premises so as to constitute an obstacle to the free ingress and egress of said Company's premises; Defendants are threatening, coercing and intimidating occupants of vehicles entering and leaving said premises and are permitting picket signs to come in physical contact with the vehicles and are causing some destruction of personal property by inflicting damages to vehicles leaving the premises; Defendant Unions are placing more than two pickets at times within fifty (50) feet of an entrance to the Company's premises, and at times there are more than two pickets within fifty (50) feet of other pickets; the Defendants are obstructing the traffic on said Highway 110, thereby creating a menace and a clear and present danger to the health and safety of the public; Defendants are threatening violence against Plaintiff and its employees and are provoking violence on the part of the officers, agents and employees of Plaintiff and Defendants are obstructing or attempting to obstruct the free use of the streets and highway adjacent to the Plaintiff's place of business and are obstructing the free ingress and egress to and from Plaintiff's premises; certain members of the Union are harrassing and picketing the private homes and residences of

certain employees working for said Company and in furtherance thereof are causing harrassment and worry to the families of certain employees, and the Defendant Unions are causing signs such as "Strike Breaker Lives Here" to be placed at or near the private homes and residences of certain employees now working for said Company, all in violation of Article 5154f of the Revised Civil Statutes of Texas, 1926; Defendants are by telephonic communication threatening, intimidating and coercing employees now working for said Company; and Defendant Unions are by threats of force or violence are attempting to prevent the Company's employees from engaging in a lawful vocation, in violation of Article 1621b and Article 1146 of the Penal Code of the State of Texas, and the Defendants are continuing the hereinabove set out unlawful acts and are causing immediate and irreparable damage to Plaintiff and to Plaintiff's properties and Plaintiff is entitled to the restraining order as herein granted, same being within its allegations and prayer.

It is accordingly ORDERED that the Clerk of this Court issue a temporary restraining order, operative until and pending the hearing below ordered, restraining and enjoining INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, and all members thereof; LOCAL UNION 782 of the INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, and all members thereof; JAMES PIERCE, ROBERT E, WALTERS, IRVIN V. SIMS, JR., CARLOS E. MORGAN, BIRTIE JACKSON, RAYMOND J. BEALL, ROY A. WALLACE, WILLIAM

L. CHAMBERS, DONALD G. YOUNG, HERSHELL PRUITT, BOBBIE FEW AND IRBY LEE MORRIS, and all striking employees of General Electric Company Air Conditioning Department, Tyler, Texas, Defendants from:

(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants.

(2) Unlawfully delaying the entrances and exists of vehicles and persons into and from the premises of said General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas.

(3) Unlawfully placing vehicles upon Highway 110 at or near the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas, so as to constitute an obstacle to the free ingress and egress of the Company's premises and preventing citizens of this State and County from entering and leaving such premises.

(4) Striking or hitting with picket signs or other objects carried by the pickets, vehicles entering and leaving the Company's premises.

(5) Unlawfully placing more than two (2) pickets at any time within fifty (50) feet of an entrance to the Company's premises or placing more than two (2) pickets within fifty (50) feet of other pickets.

(6) Threatening violence against Company and its employees and provoking violence on the part of the officers, agents and employees of Company, and from obstructing or attempting to obstruct the free use of the streets and highway adjacent to Company's place of business and obstructing the free ingress and egress to and from Company's premises.

(7) Unlawfully obstructing the traffic of Highway 110 in front of the company's premises so as to create a menace and danger to the health and safety of citizens of this State traveling upon and using said State Highway 110.

(8) Unlawfully threatening, coercing and intimidating the occupants of vehicles entering and leaving said premises of General Electric Company Air Conditioning Department aforesaid.

(9) Unlawfully harrassing and intimidating employees working for said Company by picketing or attempting to picket the homes or private residences of the working employees or in any manner unlawfully assembling at or near the homes and residences of said working employees at any time and displaying signs or placards containing language thereon indicating in any manner that the occupant or occupants of such homes and residences are "strike breakers."

(10) From threatening or coercing working employees of said Company by telephonic communication or any other manner calculated to threaten, intimidate or coerce such working employees.

(11) In any manner unlawfully interferring with the normal operation of the Company's properties and in the conduct of its business.

(12) Committing acts of destruction or in any manner damaging any of the vehicles entering or leaving the premises of General Electric Company Air Conditioning Department aforesaid.

(13) Molesting, intimidating, threatening or inflicting physical violence upon any person or persons performing services for General Electric Company Air Conditioning Department whether such services are being performed upon or off said Company's premises.

(14) From violating the right of any person or persons to engage in a lawful vocation within the meaning of Article 1621b and Article 1146 of the Penal Code of the State of Texas;

Provided that Plaintiff shall, prior to the issuance of such restraining order, file with the Clerk a bond executed by it in the sum of Five Thousand Dollars ($5,000.00) payable to Defendants, with two or more good and sufficient sureties, or surety bond, approved and conditioned as the law requires.

It is further ORDERED that Plaintiff's application for temporary injunction, effective until final decree herein, as contained in its verified Petition, be heard before me at 10:00 o'clock A. M. on the 24th day of October, 1960, in the District Courtroom in the Courthouse of Smith County, in the City of Tyler, Texas.

At Chambers this the 14th day of October, 1960, at 4:40 o'clock P. M.

/s/ Connally McKay

Judge of the 114th Judicial District Court of Smith County, Texas

Filed: October 14, 1960

Recorded: Volume 4, pages 609-612, Civil Minutes of the 114th Judicial District Court of Smith County, Texas.

Plaintiff's Affidavit for Contempt and Order Setting Date for Hearing Directed to James Pierce

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No. 60-739

GENERAL ELECTRIC COMPANY

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *et al.*

In the 114th Judicial District Court of Smith County, Texas

TOM SPROULE, agent and representative of the Plaintiff being duly sworn, says that hertofore, to wit, on the 14th day of October, 1960, a restraining order issued out of the 114th Judicial District Court of Smith County, Texas, directed to JAMES PIERCE, a Defendant in said cause, commanding him from;

"(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants.

"(2) Unlawfully delaying the entrances and exits of vehicles and persons into and from the premises of said Gen-

eral Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas.

"(3) Unlawfully placing vehicles upon Highway 110 at or near the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas, so as to constitute an obstacle to the free ingress and egress of the Company's premises and preventing citizens of this State and County from entering and leaving such premises.

"(4) Striking or hitting with picket signs or other objects carried by the pickets, vehicles entering and leaving the Company's premises.

"(5) Unlawfully placing more than two (2) pickets at any time within fifty (50) feet of an entrance to the Company's premises or placing more than two (2) pickets within fifty (50) feet of other pickets.

"(6) Threatening violence against Company and its employees and provoking violence on the part of the officers, agents and employees of Company, and from obstructing or attempting to obstruct the free use of the streets and highway adjacent to Company's place of business and obstructing the free ingress and egress to and from Company's permises.

"(7) Unlawfully obstructing the traffic on Highway 110 in front of the Company's premises so as to create a menace and danger to the health and safety of citizens of this State traveling upon and using said State Highway 110.

"(8) Unlawfully threatening, coercing and intimidating the occupants of vehicles entering and leaving said premises of General Electric Company Air Conditioning Department aforesaid.

"(9) Unlawfully harrassing and intimidating employees working for said Company by picketing or attempting to picketed the homes or private residences of the working employees or in any manner unlawfully assembling at or near the homes and residences of said working employees at any time and displaying signs or placards containing language thereon indicating in any manner that the occupant or occupants of such homes and residences are "strike breakers."

"(10) From threatening or coercing working employees of said Company by telephonic communication or any other manner calculated to threaten, intimidate or coerce such working employees.

"(11) In any manner unlawfully interferring with the normal operation of the Company's properties and in the conduct of its business.

"(12) Committing acts of destruction or in any manner damaging any of the vehicles entering or leaving the premises of General Electric Company Air Conditioning Department aforesaid.

"(13) Molesting, intimidating, threatening or inflicting physical violence upon any person or persons performing services for General Electric Company Air Conditioning Department whether such services are being performed upon or off said Company's premises.

"(14) From violating the right of any person or persons to engage in a lawful vocation within the meaning of Article 1621b and Article 1146 of the Penal Code of the State of Texas;" and that said Writ was duly served on the said JAMES PIERCE on the 16th day of October, 1960; and that said JAMES PIERCE had actual notice of said Writ prior to the 17th day of October, 1960; and that said JAMES PIERCE on the 17th day of October, 1960, knowingly and wilfully and without justification or excuse, when he could and should have done otherwise, refused to obey the commands of said Writ in that:

(1) He did on October 17, 1960, unlawfully obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed;

(2) He did on October 17, 1960, unlawfully delay the entrances and exits of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas;

(3) He did on October 17, 1960, obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises;

(4) He did on October 17, 1960, unlawfully obstruct the traffic on State Highway 110 in front of the Com-

pany's premises so as to create a meance and danger to the health and safety of the citizens of this State traveling upon and using State Highway 110;
and continues such conduct, all of which the said TOM SPROULE charges constituted contempt of this Court.

WHEREFORE, the said TOM SPROULE, prays that JAMES PIERCE be held in and punished for such contempt and for such orders, processes or attachments and such proceeding as may be proper in the premises.

GENERAL ELECTRIC COMPANY

By /s/ Tom Sproule

Tom Sproule
Plaintiff

SWORN TO AND SUBSCRIBED by TOM SPROULE, agent and representative of the Plaintiff, before me, this 17th day of October, 1960, to certify which witness my hand and seal of office.

/s/ Leona Quin

(SEAL)

Notary Public in and for
Smith County, Texas

Filed: October 19, 1960.

Plaintiff's Affidavit for Contempt & Order Setting Date for Hearing Directed to Raymond J. Beall

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No. 60-739

GENERAL ELECTRIC COMPANY

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *et al.*

In the 114th Judicial District Court of Smith County, Texas

TOM SPROULE, agent and representative of the Plaintiff, being duly sworn, says that heretofore, to wit, on the 14th day of October, 1960, a restraining order issued out of the 114th Judicial District Court of Smith County, Texas, directed to RAYMOND J. BEALL, a Defendant in said cause, commanding him from:

"(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants.

"(2) Unlawfully delaying the entrances and exits of vehicles and persons into and from the premises of said General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas.

"(3) Unlawfully placing vehicles upon Highway 110 at or near the premises of General Electric Company Air Con-

ditioning Department located on the Troup Highway, Smith County, Texas, so as to constitute an obstacle to the free ingress and egress of the Company's premises and preventing citizens of this State and County from entering and leaving such premises.

"(4) Striking or hitting with picket signs or other objects carried by the pickets, vehicles entering and leaving the Company's premises.

"(5) Unlawfully placing more than two (2) pickets at any time within fifty (50) feet of an entrance to the Company's premises or placing more than two (2) pickets within fifty (50) feet of other pickets.

"(6) Threatening violence against Company and its employees and provoking violence on the part of the officers, agents and employees of Company, and from obstructing or attempting to obstruct the free use of the streets and highway adjacent to Company's place of business and obstructing the free ingress and egress to and from Company's premises.

"(7) Unlawfully obstructing the traffic on Highway 110 in front of the Company's premises so as to create a menace and danger to the health and sat ty of citizens of this State traveling upon and using said State Highway 110.

"(8) Unlawfully threatening, coercing and intimidating the occupants of vehicles entering and leaving said premises of General Electric Company Air Conditioning Department aforesaid.

"(9) Unlawfully harrassing and intimidating employees working for said Company by picketing or attempting to picket the homes or private residences of the working employees or in any manner unlawfully assembling at or near the homes and residences of said working employees at any time and displaying signs or placards containing language thereon indicating in any manner that the occupant or occupants of such homes and residences are 'strike breakers.'

"(10) From threatening or coercing working employees of said Company by telephonic communication or any other manner calculated to threaten, intimidate or coerce such working employees.

"(11) In any manner unlawfully interfering with the normal operation of the Company's properties and in the conduct of its business.

"(12) Committing acts of destruction or in any manner damaging any of the vehicles entering or leaving the premises of General Electric Company Air Conditioning Department aforesaid.

"(13) Molesting, intimidating, threatening or inflicting physical violence upon any person or persons performing services for General Electric Company Air Conditioning Department whether such services are being performed upon or off said Company's premises.

"(14) From violating the right of any person or persons to engage in a lawful vocation within the meaning

of Article 1621b and Article 1146 of the Penal Code of the State of Texas;" And that said Writ was duly served on the said RAYMOND J. BEALL on the 14th day of October, 1960; and that said RAYMOND J. BEALL had actual notice of said Writ prior to the 17th day of October, 1960; and that said RAYMOND J. BEALL on the 17th day of October, 1960, knowingly and wilfully and without justification or excuse, when he could and should have done otherwise, refused to obey the commands of said Writ in that;

(1) He did on October 17, 1960, unlawfully obstruct the free ingress and egress of Vehicles and persons into and from the premises of General Electric Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed;

(2) He did on October 17, 1960, unlawfully delay the entrances and exits of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas;

(3) He did on October 17, 1960, obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises;

and continues such conduct, all of which the said TOM SPROULE charges constituted contempt of this Court.

WHEREFORE, the said TOM SPROULE prays that RAYMOND J. BEALE be held in and punished for such contempt and for such orders, processes or attachment and such proceeding as may be proper in the premises.

GENERAL ELECTRIC COMPANY

By /s/ Tom Sproule

Tom Sproule
PLAINTIFF

SWORN TO AND SUBSCRIBED by TOM SPROULE, agent and representative of the Plaintiff, before me this 19th day of October, 1960, to certify which witness my hand and seal of office.

/s/ Jimmy Lee Perry

Notary Public in and for
Smith County, Texas

(SEAL)

No. 60-739

GENERAL ELECTRIC COMPANY

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *et al.*

In the 114th Judicial District Court of Smith County, Texas

ORDER

THE STATE OF TEXAS }
COUNTY OF SMITH }

AT CHAMBERS THIS 19th day of October, 1960.

The above and foregoing Affidavit, having been read and fully understood, it is ORDERED that the Clerk of this Court forthwith issue a Notice to RAYMOND J. BEALL, directing and requiring him to be and appear before the 114th Judicial District Court of Smith County, Texas, at the Courthouse of said County in the City of Tyler, Texas on the 24 day of October, 1960, at 9:00 o'clock A. M., then and there to show cause why he should not be adjudged in contempt of Court by reasons of the acts set forth in such Affidavit.

/s/ Looney E. Lindsey
Judge Presiding

Filed: October 19, 1960.

Recorded: Volume 4, page 615, Civil Minutes of the 114th Judicial District Court of Smith, County, Texas.

Response of Defendants Pierce and Beall to Notice and Affidavit for Contempt

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No. 60-739

GENERAL ELECTRIC COMPANY

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *et al.*

In the 114th Judicial District Court of Smith County, Texas

COME NOW defendants James Pierce and Raymond J. Beall and pursuant to the Notices to Show Cause why they and each of them should not be adjudged in contempt of court by reason of the allegations set out in the affidavit of Tom Sproule would respectfully show the Court that they have in no manner violated any valid order, decree or action of this Honorable Court, and as cause why they should not be punished for contempt, would show:

1.

The restraining order which defendants are alleged to have violated is void and of no effect for each of the reasons set out in the "Motion to Dissolve Temporary Restraining Order", heretofore filed, and in Defendants'

Response to Show Cause Order, this day filed, each of which documents are incorporated herein by reference as fully as if here set out in *haec verba.*

2.

This Honorable Court had no jurisdiction to issue the restraining order which these defendants are alleged to have violated, and has no jurisdiction to hold these defendants in contempt for the violation of its terms since the United States Congress has preempted this are of labor law by passing the Labor Management Relations Act of 1947, 29 U. S. C. A. §151 et seq. as amended, and has thus placed jurisdiction of cases involving activities such as that here presented in Federal tribunals pursuant to the Federal Act. In this connection, these defendants would show that the activity alleged against them

> "is arguably subject to the (Federal) Act, (and that therefore) the states * * * must defer the determination of that question in the first instance to the 'exclusive competence of the National Labor Relations Board' * * *."

Ex Parte Dilley, et al., 334 S. W. 2d 425, 430 (Tex. Sup. 1960).

3.

This Honorable Court lacks jurisdiction with respect to any alleged obstruction of a highway for the reason that exclusive jurisdiction of such matters is lodged by virtue of Article 110ff. of the Texas C.C.P. in the County Court.

4.

The restraining order which these defendants are alleged to have violated is void for the reason that as applied to the facts of this case it denies these defendants rights of free speech guaranteed by Article I, Section 8 of the Constitution of the State of Texas, and the Fourteenth Amendment to the Constitution of the United States.

5.

The restraining order which these defendants are alleged to have violated is void for the reason that it denies these defendants rights of concerted activity guaranteed by §7 of the Labor Management Relations Act of 1947, 29 U.S.C.A. 157.

6.

The restraining order which these defendants are alleged to have violated is void because it is not supported by a proper bond as required by the laws of Texas and Rule 684, Texas Rules of Civil Procedure. By Rule 684;

> "Before the issuance of a temporary restraining order * * * the applicant shall execute and file with the Clerk a bond to the adverse party, with two or more good and sufficient sureties * * *."

The bond herein is defective in at least the following particulars:

(a) It is signed only by one Sproule who is not an officer of the plaintiff corporation or otherwise shown to be authorized to execute, affix the corporate sale, and/or deliver

bonds on behalf of the plaintiff. There is no power of attorney or other competent proof of said Sproule's authority to execute such bond and thus defendants are not protected by a bond conditioned as required by the rule and thus there being no bond as a foundation for said order, said order is void; and

(b) Said bond is not signed by "two or more good and sufficient sureties * * *" as required by Rule 684. Said bond is thus not good as a bond required by the Rules of Civil Procedure because there is a failure of the legal requirement to have thereon two good and sufficient sureties. The Rules of Civil Procedure being notice to all parties concerned that at least two sureties were required in order to be a legal bond, defendants are not protected by a proper bond as required by the rules.

7.

The restraining order is void for ambiguity, lack of definiteness and clarity. An order of a court must carry with it no uncertainty and must not be susceptible of different meanings or constructions. A case of this kind is quasi criminal, and the strictness of pleading in criminal cases applies to it. *Ex Parte Ireland*, 38 Tex. 344, 356, and an injunction decree must be definite, clear and precise, should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing and the aforesaid

restraining order does not properly or specifically inform these defendants of that which they are enjoined from doing. In this connection, these defendants incorporate herein by reference each of the special exceptions to the petition herein hertofore filed and would further show that said restraining order is indefinite, vague and ambiguous and calls on defendants to make interpretations, inferences and conclusions as to what actions defendants may take, and does not inform defendants what acts they are restrained from doing.

To restrain in such broad indefinite and conclusionary language deprives defendants of due process of law as guaranteed by Article I of the Constitution of the State of Texas and procedural due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

8.

The affidavit of Tom Sproule upon which the contempt proceeding is predicated is insufficient and the contempt proceeding is void for the reason that such affidavit does not allege facts which would constitute a violation of the restraining order. All that is alleged in conclusion. Defendants are entitled to know before they are put to jeopardy of fine or incarceration for contempt at least the following: what actions they and each of them are alleged to have taken, for example, what actions constituted unlawful obstruction of the free ingress and egress of vehicles, etc.,

what actions constituted unlawfully delaying the entrances and exits, what actions constituted obstruction and attempt to obstruct the free use of what streets and highways and that actions constituted obstruction; and when such actions took place, and what persons were allegedly obstructed.

In this connection, in order that defendants may be protected in their constitutional rights against double jeopardy and in order that determining may be *res judicata* defendants are entitled to a specification as to the time and place and manner in which it is sought to be alleged that defendants violated the restraining order. Each defendant excepts to the failure of the affidavit and contempt and the notice to show cause to provide adequate notice of the matters and things for which defendants are sought to be charged and for which plaintiff seeks to brand these defendants as contemnors and obtain their incarceration.

9.

Subject to the above and not waiving same, defendants would further show that defendants in good faith sought and intended to comply as best they could with the restraining order issued by this Court (which defendants admit was served upon them prior to October 17, 1960). These defendants interpreted said order to permit peaceful picketing on the public way at the point where the private driveway into plaintiff's plant intersects with State Highway 110. These defendants picketed on October 17, 1960, on the public way adjacent to the entrance of plain-

tiff's plant and across the intersection of the highway and the drive into plaintiff's plant. Neither defendant picketed across the highway. All picketing was on that part of the highway which constituted the shoulder of the highway and across the entrance to plaintiff's plant. These defendants continued walking across such entrance in an orderly and peaceful manner carrying picketsigns advertising the facts of the labor dispute. Such picketing in some instances delayed individual automobiles' ingress and egress from the plaintiff's plant as much as ten or fifteen seconds while the picket walked in front of said vehicle. Such delay is not unreasonable. Indeed, defendants have constitutional rights to picket which they exercised without intention to violate the orders of the Court, and these defendants believed that in said picketing and in all their activities that they were acting within their rights and in accordance with the orders of this Court and these defendants had no intention of violating the orders of this Court.

10.

Except as specifically admitted above, these defendants deny each and every allegation contained in the affidavit in contempt and demand strict proof thereof.

WHEREFORE, having shown cause why they should not be held in contempt, these defendants and each of them pray that the contempt charge against them be dismissed, that plaintiff's application that they be held in contempt

and punished be denied and that each of defendants be discharged from Court with their costs.

MULLINAX, WELLS, MORRIS & MAUZY,
1601 National Bankers Life Bldg.,
Dallas 1, Texas,

By /s/ L. N. D. WELLS, JR.

L. N. D. Wells, Jr.
POLLARD & POLLARD,
Tyler Bank Bldg.,
Tyler, Texas,

By /s/ TOM POLLARD, JR.

Tom Pollard, Jr.
Attorneys for Defendants.

THE STATE OF TEXAS }
COUNTY OF SMITH }

BEFORE ME, the undersigned authority in and for Smith County, Texas, on this 24th day of October, 1960, personally appeared James Pierce and Raymond J. Beall, each of whom being by me duly sworn upon his oath, states that the facts set forth in the foregoing pleading are true.

/s/ James Pierce
James Pierce

/s/ Raymond J. Beall
Raymond J. Beall

SUBSCRIBED and SWORN to before me this 24th day of October, 1960.

/s/ Thomas E. Wall
District Clerk in and for
Smith County, Texas

(SEAL)

Filed: October 24, 1960.

Order Finding Raymond J. Beall in Contempt and Committing Him to Custody of Sheriff

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No. 60-739

GENERAL ELECTRIC COMPANY

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *et al.*

In the 114th Judicial District Court of Smith County, Texas

BE IT REMEMBERED, that on the 24th day of October, 1960, came on to be heard the above entitled and numbered matter in which RAYMOND J. BEALL stands charged, pursuant to due complaint, with contempt of this Court for the violation of the Writ of Temporary Restraining Order heretofore issued in this case, restraining and enjoining the said Defendant, RAYMOND J. BEALL, and others from:

(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants.

(2) Unlawfully delaying the entrances and exits of vehicles and persons into and from the premises of said General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas.

(3) Unlawfully placing vehicles upon Highway 110 at or near the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas, so as to constitute an obstacle to the free ingress and egress of the Company's premises and preventing citizens of this State and County from entering and leaving such premises.

(4) Striking or hitting with picket signs or other objects carried by the pickets, vehicles entering and leaving the Company's premises.

(5) Unlawfully placing more than two (2) pickets at any time within fifty (50) feet of an entrance to the Company's premises or placing more than two (2) pickets within fifty (50) feet of other pickets.

(6) Threatening violence against Company and its employees and provoking violence on the part of the officers, agents and employees of Company, and from obstructing or attempting to obstruct the free use of the streets and highway adjacent to Company's places of business and obstructing the free ingress and egress to and from Company's premises.

(7) Unlawfully obstructing the traffic on Highway 110 in front of the Company's premises so as to create a menace and danger to the health and safety of citizens of this State traveling upon and using said State Highway 110.

(8) Unlawfully threatening, coercing and intimidating the occupants of vehicles entering and leaving said premises of General Electric Company Air Conditioning Department aforesaid.

(9) Unlawfully harrassing and intimidating employees working for said Company by picketing or attempting to picket the homes or private residences of the working employees or in any manner unlawfully assembling at or near the homes and residences of said working employees at any time and displaying signs or placards containing language thereon indicating in any manner that the occupant or occupants of such homes and residences are "strike breakers."

(10) From threatening or coercing working employees of said Company by telephonic communication or any other manner calculated to threaten, intimidate or coerce such working employees.

(11) In any manner unlawfully interferring with the normal operation of the Company's properties and in the conduct of its business.

(12) Committing acts of destruction or in any manner damaging any of the vehicles entering or leaving the premises of General Electric Company Air Conditioning Department aforesaid.

(13) Molesting, intimidating, threatening or inflicting physical violence upon any person or persons performing services for General Electric Company Air Conditioning Department whether such services are being performed upon or off said Company's premises.

(14) From violating the right of any person or persons to engage in a lawful vocation within the meaning of Article 1621b and Article 1146 of the Penal Code of the State of Texas.

And it appearing to the Court that the said RAYMOND J. BEALL has been duly cited to appear before this Court on October 24, 1960, at 9:00 o'clock A.M., then and there to show cause why he should not be adjudged in contempt of Court by reasons of his conduct in certain respects hereinafter specified.

And it further appearing that said Defendant has filed answer and appears herein in person and by and through counsel, and the Court, having heard the same as well as the Complaint, due proof of such contempt and the evidence offered by Plaintiff, GENERAL ELECTRIC COMPANY, whereupon, the Court with consent of all counsel postponed until this the 3rd day of November, 1960, the argument of counsel, and on this date as shown below the Court heard all argument of counsel and the Court is of the opinion, and it is accordingly ORDERED, ADJUDGED and DECREED that the said RAYMOND J. BEALL is guilty of contempt of this Court by reason of committing the following described specific acts, to wit:

(1) He did on October 17, 1960, unlawfully obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises then picketed;

(2) He did on October 17, 1960, unlawfully delay the entrances and exits of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas;

(3) He did on October 17, 1960, obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises;

It is, therefore, the opinion of this Court that the Defendant, RAYMOND J. BEALL, is guilty of contempt of Court as charged and it is the judgment of this Court he is so adjudged and a punishment is hereby assessed at imprisonment in the County jail of Smith County, at Tyler, Texas, for 2 days and a Fine of $100.00; and it is ORDERED and ADJUDGED by the Court that the State of Texas do have and recover of Defendant, RAYMOND J. BEALL, the said fine of $100.00 and all costs of this proceeding, and let commitment issue to any Sheriff or any Constable within the State of Texas, reciting generally the proceedings hereon and accompanied by a certified copy of this judgment to be served upon said Defendant, RAYMOND J. BEALL, as further evidence of the said officer's authority, and further that the said RAYMOND J. BEALL pay all costs of this proceeding, for which let execution issue.

DATED, SIGNED and ENTERED at Tyler, Texas, this 3rd day of November, A. D., 1960, at 3:10 o'clock P. M.

/s/ Looney E. Lindsey
Judge Presiding

Filed: November 3, 1960

Recorded: Volume 4, Pages 623-625, Civil Minutes of the 114th Judicial District Court of Smith County, Texas.

Order Finding James Pierce in Contempt and Committing Him to Custody of Sheriff

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No. 60-739

GENERAL ELECTRIC COMPANY

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *et al.*

In the 114th Judicial District Court of Smith County, Texas

BE IT REMEMBERED, that on the 24th day of October, 1960, came on to be heard the above entitled and numbered matter in which JAMES PIERCE stands charged, pursuant to due complaint, with contempt of this Court for the violation of the Writ of Temporary Restraining Order heretofore issued in this case, restraining and enjoining the said Defendant, JAMES PIERCE, and others from:

(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants.

(2) Unlawfully delaying the entrances and exits of vehicles and persons into and from the premises of said Gen-

eral Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas.

(3) Unlawfully placing vehicles upon Highway 110 at or near the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas, so as to constitute an obstacle to the free ingress and egress of the Company's premises and preventing citizens of this State and County from entering and leaving such premises.

(4) Striking or hitting with picket signs or other objects carried by the pickets, vehicles entering and leaving the Company's premises.

(5) Unlawfully placing more than two (2) pickets at any time within fifty (50) feet of an entrance to the Company's premises or placing more than two (2) pickets within fifty (50) feet of other pickets.

(6) Threatening violence against Company and its employees and provoking violence on the part of the officers, agents and employees of Company, and from obstructing or attempting to obstruct the free use of the streets and highway adjacent to Company's place of business and obstructing the free ingress and egress to and from Company's premises.

(7) Unlawfully obstructing the traffic on Highway 110 in front of the Company's premises so as to create a menace and danger to the health and safety of citizens of this State traveling upon and using said State Highway 110.

(8) Unlawfully threatening, coercing and intimidating the occupants of vehicles entering and leaving said premises

of General Electric Company Air Conditioning Department aforesaid.

(9) Unlawfully harrassing and intimidating employees working for said Company by picketing or attempting to picket the homes or private residences of the working employees or in any manner unlawfully assembling at or near the homes and residences of said working employees at any time and displaying signs or placards containing language thereon indicating in any manner that the occupant or occupants of such homes and residences are "strike breakers."

(10) From threatening or coercing working employees of said Company by telephonic communication or any other manner calculated to threaten, intimidate or coerce such working employees.

(11) In any manner unlawfully interferring with the normal operation of the Company's properties and in the conduct of its business.

(12) Committing acts of destruction or in any manner damaging any of the vehicles entering or leaving the premises of General Electric Company Air Conditioning Department aforesaid.

(13) Molesting, intimidating, threatening or inflicting physical violence upon any person or persons performing services for General Electric Company Air Conditioning Department whether such services are being performed upon or off said Company's premises.

(14) From violating the right of any person or persons to engage in a lawful vocation within the meaning of Article

1621b and Article 1146 of the Penal Code of the State of Texas.

And it appearing to the Court that the said JAMES PIERCE has been duly cited to appear before this Court on October 24, 1960, at 9:00 o'clock A. M., then and there to show cause why he should not be adjudged in contempt of Court by reasons of his conduct in certain respects hereinafter specified.

And it further appearing that said Defendant has filed answer and appears herein in person and by and through counsel, and the Court, having heard the same as well as the Complaint, due proof of such contempt and the evidence offered by Plaintiff, GENERAL ELECTRIC COMPANY, whereupon, the Court with consent of all counsel postponed until this the 3rd day of November, 1960, the argument of counsel, and on this date as shown below the Court heard all argument of counsel and the Court is of the opinion, and it is accordingly ORDERED, ADJUDGED and DECREED that the said JAMES PIERCE is guilty of contempt of this Court by reason of committing the following described specific acts, to wit:

(1) He did on October 17, 1960, unlawfully obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises then picketed;

(2) He did on October 17, 1960, unlawfully delay the entrances and exits of vehicles and persons into and from

the premises of General Electric Company Air Conditioning Department on the Troup Highway, Smith County, Texas;

(3) He did on October 17, 1960, obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises;

(4) He did on October 17, 1960, unlawfully obstruct the traffic on State Highway 110 in front of the Company's premises so as to create a menace and danger to the health and safety of the citizens of this State traveling upon and using State Highway 110.

It is, therefore, the opinion of this Court that the Defendant, JAMES PIERCE, is guilty of contempt of Court as charged and it is the judgment of this Court he is so adjudged and a punishment is hereby assessed at imprisonment in the County Jail of Smith County, at Tyler, Texas, for 3 days and a fine of $100.00; and it is ORDERED and ADJUDGED by the Court that the State of Texas do have and recover of Defendant, JAMES PIERCE, the said fine of $100.00 and all costs of this proceeding, and let commitment issue to any Sheriff or any Constable within the State of Texas, reciting generally the proceedings hereon and accompanied by a certified copy of this judgment to be served upon said Defendant, JAMES PIERCE, as further evidence of the said officer's authority, and further that the said JAMES PIERCE pay all costs of this proceeding, for which let execution issue.

DATED, SIGNED and ENTERED at Tyler, Texas, this 3rd day of November, A. D., 1960, at 3:10 o'clock P. M.

/s/ Looney E. Lindsey
Judge Presiding

Filed: November 3, 1960

Recorded: Volume 4, pages 625-627, Civil Minutes of the 114th Judicial District Court of Smith County, Texas.

A-38

No. A-8094

In the

SUPREME COURT OF TEXAS

EX PARTE PIERCE AND BEALL

PETITIONS FOR WRITS OF HABES CORPUS

FILED

IN SUPREME COURT
OF TEXAS

NOV. 3, 1960

GEO. H. TEMPLIN, Clerk
By Deputy

MULLINAX, WELLS, MORRIS & MAUZY,
By: L. N. D. WELLS, JR.,
1601 National Bankers Life Bldg.,
Dallas 1, Texas,
Attorneys for Petitioners.

No. A-8094

In the

SUPREME COU RT OF TEXAS

EX PARTE
JAMES PIERCE AND
RAYMOND J. BEALL

PETITIONS FOR WRITS OF HABES CORPUS

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF TEXAS:

NOW COME James Pierce and Raymond J. Beall, hereinafter called petitioners, and file this their original petition for writs of habeas corpus, and as grounds for said writs respectfully show the following:

1.

Each petitioner is being unlawfully confined and restrained of his liberty in the common jail of Smith County, in Smith County, Texas, by Harlon Long, Sheriff of Smith County. Said confinement and restraint are not by virtue of any lawful or legal writ, order, judgment or process. Proof of said confinement is shown by the telegram from the Sheriff of Smith County dated this date and attached hereto as Exhibit 1.

2.

Each petitioner is confined and restrained by virtue of a commitment order issued pursuant to a judgment of contempt entered by the Honorable Looney E. Lindsay, Acting Judge of the 114th District Court of Smith County, Texas, in a Civil cause styled *General Electric Company v. International Union of Electrical, Radio and Machine Workers*, AFL-CIO, ET AL, No. 60-739, which judgment of contempt was entered on November 3, 1960, and a copy of which is attached hereto as Exhibit 2.

Each petitioner was taken into custody upon the entry of the aforesaid judgment of contempt and is presently confined in the custody of the Sheriff of Smith County as aforesaid and will remain so incarcerated for a period of 3 days for Pierce and 2 days for Beall unless each petitioner is granted writ of habeas corpus here sought.

The aforesaid judgment and commitment order are void, were entered without jurisdiction and in violation of the constitutional rights of each petitioner as will be set forth in greater detail hereinbelow.

3.

On October 14, 1960, General Electric Company filed suit against the International Union of Electrical, Radio and Machine Workers, AFL-CIO, and others as per Plaintiffs' Original Petition, which is attached hereto as Exhibit 3, complaining of certain acts of picketing, all as appears more specifically from Plaintiffs' Original Petition.

An Ex parte temporary restraining order was issued on October 14, 1960. A copy is attached hereto as Exhibit 4.

Certain defendants in said cause, including the relators filed a response to show cause order asserting that the District Court lacked jurisdiction of the parties and the subject matter of the action; that the activity sought to be enjoined is protected activity under Federal and State law, and setting forth certain other defenses, all as appear in said defendants' "Response to Show Cause Order" attached hereto as Exhibit 5.

Thereafter, and notwithstanding the Temporary Restraining Order, your relators continued picketing in a peaceful and lawful manner on the shoulder of the public highway at the point where the entrance to plaintiffs' plant intersects said highway.

Thereupon, plaintiff submitted to the presiding judge which had issued the temporary Restraining Order, a pleading entitled "Affidavit of Contempt", alleging that your relators had violated the aforesaid temporary Restraining Order and seeking punishment of your relators, all as appears more fully in said pleading attached hereto as Exhibit 6.

Thereafter, the presiding judge issued an order to show cause requiring your relators to show cause why they should not be punished for contempt.

Thereafter your relators filed a "Response to Notice and Affidavit" for contempt (Exhibit 7) wherein relators asserted that the District Court lacked jurisdiction, that application of the injunction in the premises constitutes a

denial of rights of free speech as guaranteed by cited provisions of the constitution, that the injunction was void for indefiniteness and ambiguity and for violation of the requirement of Texas Rules of Civil Procedure, and that the Restraining Order was not supported by proper bond and other defenses.

Thereafter, testimony and proceedings were had before the Honorable Looney Lindsay, sitting for the Judge of the 114th District Court of Smith County, Texas, which proceedings were recorded by the official Court reporter but are not yet transcribed. Upon transcription these will be filed in this Court.

Thereafter, said Honorable Looney Lindsay found relators guilty of contempt and fined relators $100.00 each and ordered them incarcerated in the Smith County jail for 3 days for Pierce and 2 days for Beall, where they are now being held as aforesaid.

The Honorable 114th District Court had no jurisdiction to enjoin said acts of picketing and publication of said Court's orders of temporary injunction and the finding of contempt are void for the reason that jurisdiction of the parties are subject matter of said action had been preempted by the Labor Management Relations Act of 1947, as amended, (Taft-Hartley Act) and by the Labor-Management Reporting and Disclosure Act of 1959, and the exclusive jurisdiction to hear and determine same lies under such federal statutes through the administrative and judicial procedure therein provided before federal tribunals, all as appears in more detail from the pleadings,

testimony, stipulations and admissions contained in the exhibits heretofore described and attached hereto.

5.

The acts of picketing which the District Court enjoined and which the District Court found to constitute contempt were all acts of free speech privileged under and protected by Article I, Section 8 of the Constitution of the State of Texas and the First and Fourteenth Amendments to the Constitution of the United States. Relators are being denied these constitutional rights of free speech.

6.

The injunction order was void and could not properly base the contempt finding or commitment for the reasons that:

A. The injunction order did not follow the requirements of Rule 683, Texas Rules of Civil Procedure in this:

(1) It was ambiguous and contradictory and is not "specific in terms" as required by said Rule, and

(2) For the reason that by reason of its ambiguity and contradiction said injunction order requires relators to guess at their peril what acts are lawful and what are not, thus depriving your relators of that degree of definiteness and certainty which are requisite to their constitutional rights of due process of law.

B. For the reason that the Temporary Restraining Order was not supported by proper bond as required by Rule 684.

C. For the reason that the affidavit for contempt is insufficient.

7.

For the foregoing reasons, and for the reasons as set forth in defendants' response to Affidavit for Contempt, habeas corpus should be granted relators.

WHEREFORE, all of the aforesaid proceedings in Cause No. 60-739 pending in the 114th District Court of Smith County, Texas, including particularly the aforesaid temporary Restraining Order as construed by the District Court and the contempt adjudication and orders of commitment being void, and Harlon Long, the Sheriff of Smith County, Texas, under and by virtue of said void orders depriving relators of their liberty, relators pray that the Honorable Supreme Court of Texas grant and issue its writs of habeas corpus to have each petitioner brought before This Court, to the end that he may be discharged from such illegal confinement and restraint and that pending such time, the Court order the immediate release of each petitioner upon his own recognizance or upon such security as the Court may demand, which each petitioner is ready and willing to offer.

Respectfully submitted,

MULLINAX, WELLS, MORRIS & MAUZY,

By L. N. D. WELLS, JR.

L. N. D. Wells, Jr.
1601 National Bankers Life Bldg.,
Dallas 1, Texas,
Attorneys for Petitioners.

THE STATE OF TEXAS }
COUNTY OF SMITH }

BEFORE ME, the undersigned authority, on this day personally appeared L. N. D. Wells, Jr., attorney for petitioners herein, who, having been by me first duly sworn, states that he is the attorney for said petitioners and that he has knowledge of the facts contained in the above petition and that the same are true and correct.

(Signed) L. N. D. WELLS, JR.

L. N. D. Wells, Jr.

SWORN to and SUBSCRIBED this 3rd day of November, 1960.

(Signed) MRS. JEWELL SEELIGER

Notary Public in and for
Travis County, Texas

A-46

No. A-8094

In the

SUPREME COURT OF TEXAS

EX PARTE JAMES PIERCE
AND RAYMOND J. BEALL

Relators seek by writ of habeas corpus to secure relief from fines and terms of imprisonment in jail imposed on them as punishment for contempt. They were adjudged guilty of contempt for violating the terms of a restraining order issued by the District Judge of the 114th Judicial District. We ordered relators released from custody pending determination of the validity of the contempt judgment.

On October 2, 1960 General Electric Company's local plant near Tyler, known as General Electric Air Conditioning Department, was struck by its employee-members of Local Union 782 of the International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O. Pickets were posted at the entrance to the plant. On October 14th the district judge, acting in chambers and pursuant to General Electric Company's verified petition, issued an ex parte restraining order restraining the members of the national and local unions and certain named individuals, including relators Pierce and Beall, from committing some fourteen

different acts. Only numbered paragraphs (1), (2) and (7) of the order are important to our discussion inasmuch as only the acts there restrained were found in the contempt judgment to have been committed in violation of the order. Those paragraphs read as follows:

> "(1) Unlawfully obstructing the free ingress and egress of vehicles and persons into and from the premises of the General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed by the Defendants."
>
> "(2) Unlawfully delaying the entrances and exists of vehicles and persons into and from the premises of said General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas."
>
> "(7) Unlawfully obstructing the traffic on Highway 110 in front of the company's premises so as to create a menace and danger to the health and safety of citizens of this State traveling upon and using said State Highway 110."

On October 19th show cause orders were entered, pursuant to affidavit of contempt, directing relators to appear and show cause why they should not be adjudged in contempt for violating the restraining order on October 17th. Following a trial, each of the relators was adjudged to have violated the restraining order in the following respects:

> "(1) He did on October 17, 1960, unlawfully obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises then picketed;"

"(2) He did on October 17, 1960, unlawfully delay the entrances and exists of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas;"

"(3) He did on October 17, 1960, obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises;"

Relators recognize that they cannot secure relief in a habeas corpus proceeding unless the contempt judgment is void. They assert in their brief that the judgment is void because the restraining order itself is void, in that: (1). The trial court had no jurisdiction to enter it. (2). It violates constitutional rights of free speech and assembly. (3). It is too vague and general in its terms. (4). It is not supported by a proper bond.

The contention that the trial court had no jurisdiction to enter the restraining order is based upon relators's further contention that inasmuch as the employer's business is in or affects interstate commerce, jurisdiction of the subject matter of the strike and picketing is preempted to the National Labor Relations Board by certain sections of the Taft-Hartley Law. Granting that is true if the picketing prior to the entry of the restraining order had been peaceful, it is not true if the evidence before the court would support a conclusion that the order was necessary the preserve the public peace and welfare against interference with free ingress and egress of non-striking employees and others to the plant or the obstruction of travel

on the adjacent public highway. Youngdahl v. Rainfair, 355 U. S. 131, 2 L. Ed. 151, 78 S. Ct. 206; United A.A. & A.I. Workers v. Wisconsin Emp. Rel. Board, 351 U. S. 266, 100 L. Ed. 1162, 76 S. Ct. 794. In *Youngdahl* the Supreme Court of The United States upheld jurisdiction of a state court to enjoin "strikers and union representatives 'from obstructing, or attempting to obstruct the free use of the streets adjacent to [the employer's] place of business, and the free ingress and egress to and from [the employer's] property'." In *United A.A. & A.I. Workers* the Court upheld jurisdiction of the Wisconsin Employment Relations Board to enjoin the unions, their officers, members and agents from "Obstructing or interfering in any way with entrance to and egress from the premises of the Kohler Company" and from "Obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company." Jurisdiction of the state courts and agencies was upheld in both cases over protest that jurisdiction of the subject matter had been preempted to the NLRB by the Taft-Hartley Act.

Relators seem to argue that there was no evidentiary basis for the restraining order. Rule 680, Texas Rules of Civil Procedure, authorizes the granting of restraining orders, without notice, upon verified petition setting out facts showing that, unless granted, immediate and irreparable injury, loss, or damage will be done to the applicant. The rule contemplates that restraining orders will be granted only in cases of emergency, and that in the absence

of good cause for extension they will have life only for a necessary brief period in which notice can be given and a hearing on an application for temporary injunction can be held. Necessarily, an application for a restraining order is addressed largely to the discretion and good judgment of the trial judge. He will grant or deny an ex parte restraining order according as the need for it may appear from the verified facts contained in the petition. The only evidence before him is the verified facts in the petition. If that evidence supports the order and the court has jurisdiction of the subject matter, it must be obeyed. Disobedience of it is not justified or excused because evidence developed on a contempt hearing may disclose that the facts verified in the petition were not true.

The verified petition on which the restraining order was granted in this case contains the following allegations or statements of fact:

> "(1) Defendants' pickets are obstructing the free ingress and egress of vehicles into and from the premises of the Company by placing their persons directly in front of such vehicles and in such manner preventing the free passage of the vehicles, resulting in unreasonable delay in obtaining lawful entrance and exits therefrom.
>
> "(2) That certain members of said Unions are deliberately placing their vehicles upon said Highway 110 directly in front of the picketed premises so as to constitute an obstacle to the free ingress and egress of the Company's premises and preventing other citizens from freely entering and leaving such premises.
>
> "(5) The Defendants are obstructing the traffic on said Highway 110, thereby creating a menace and a

clear and present danger to the health and safety of the public of this State, traveling upon and using said State Highway."

While those allegations or statements of fact may not be as specific as they have been, they are not so conclusional in character as to render the restraining order void. They are the evidence upon which paragraphs (1), (2) and (7) of the restraining order was based, and they are adequate to support the jurisdiction of the court over the subject matter. Youngdahl vs. Rainfair, supra; United A.A. & A.I. Workers vs. Wisconsin Emp. Rel. Board.

What has been said disposes of the first two grounds on which relators attack the validity of the restraining order. Constitutional protection of the rights of free speech and free assembly does not license interference with and obstruction of public ways or of entrances to and exists from places of business. Ex Parte Henry, 147 Tex. 315, 215 S. W. (2) 588, is not in point on the facts and, therefore, is not controlling. The injunction in that case restrained striking employees from picketing "on, across, at or near or within 100 feet of the railroad tracks" being used to transport freight into and from the employer's plant. This court held that in so far as the judgment attempted to restrain peaceful picketing at, near, across or within 100 feet of the railway tracks, it was void. Our conclusion in that respect was based upon our holding that "So long as the pickets did not physically obstruct the spur tracks and thereby nullify or seriously impair the right of the railways to use the street, they had the same right to use the street as the railways had." Another part of the

injunction restrained picketing at or near the railway tracks "in such manner as to prevent the railway employees from serving the plant." In so far as the judgment of contempt rested upon a violation of that part of the injunction, we held it void because the evidence on the trial established that the picketing "constituted no physical obstruction to anybody going into or coming out of the plant."

The contention that the restraining order in this case was void because it was too general and vague is based upon the trial court's use of the word "unlawfully" in setting out the acts and conduct restrained. A further complaint is that the notice served on relators contained the same vice of generality. It is argued that by the wording of the order relators were left free to obstruct ingress and egress to the plant, to delay entrances and exits of persons to and from the premises, and to obstruct traffic on highway 110, so long as such conduct did not reach the stage of being unlawful, and that they had no means of determining to what extent such conduct was lawful and to what extent it was unlawful. Such generality in the notice, it is argued, was a denial of procedural due process. In support of their position relators cite Hopkins vs. Frenchy, Tex. Civ. App., 75 S.W.(2) 184.

We do not interpret the trial court's use of the word "unlawfully" as do relators. Except for the use of the word "unlawfully", the language used by the trial court in defining the conduct restrained is almost identical with that used in restraining similar conduct in *Youngdahl* and *United A.A. & A.I. Workers.* Any conduct by pickets which

obstructed "the free ingress and egress of vehicles and persons into and from the premises", or which unreasonably delayed "the entrances and exits of vehicles and persons into and from the premises", or which obstructed "the traffic on Highway 110 so as to create a menace and danger to the health and safety of the citizens", was unlawful in the sense that it was conduct which the courts would not countenance or permit. We interpret the trial court's use of the word "unlawfully" as indicating that the conduct restrained was regarded by the court as being unlawful. The order condemned in Hopkins vs. Frenchy restrained police of the City of San Antonio from "unlawfully" interfering with the plaintiffs' "lawful" operation of their restaurant and soft drink business. The orders are obviously not the same.

Relators' claim that the restraining order bond was void is based on the fact that the evidence does not show formal authority of the agent who executed the bond on behalf of the principal. The bond was executed on behalf of General Electric Company by Tom Sproule, general manager of the plant at Tyler. He testified that he was authorized to execute the bond by legal counsel for the principal. Absence of more formal authority does not invalidate the bond.

Although no such point is contained in their brief, relators seem to argue there, as they undoubtedly did in oral argument, that there was no evidence adduced at their trial supporting the judgment of contempt. Our only right to review the evidence is for the purpose of determining whether relators have been deprived of their liberty with-

out due process of law. If there is in the record evidence from which the trial court could conclude that they violated the restraining order, they have not been denied due process. Ex Parte Helms, 152 Tex. 480, 259 S.W. (2) 184, 186; Ex Parte Morris, 147 Tex. 140, 215 S.W. (2) 598. There is ample evidence to support the trial court's conclusion. We will content ourselves with a brief summary of it.

General Electric's plant is located just North of Highway 110 which connects Tyler, situated some four or five miles West of the plant, with Troup, some eleven or twelve miles East of the plant. A private roadway leads from Highway 110 to the main entrance to the plant. Employees and others traveling East from Tyler and wishing to enter the plant premises had to make a left turn from the South traffic lane across the North traffic lane to enter the private road. Union pickets stationed themselves just inside the North right-of-way of Highway 110, one to the East and one to the West of the private road entrance, and walked back and forth across the entrance, passing each other near the center of the entrance. Relator Pierce was on picket duty during early morning hours when non-striking employees were arriving for work. Relator Beall was on picket duty in the afternoon when non-striking employees were leaving the plant.

There is testimony that the pace of Pierce and the other morning picket was so slow and deliberate as to back up some 25 or 30 automobiles approaching from Tyler and intending to enter the plant premises; that the interval

between the crossing of the pickets and their return was so brief that only one automobile could pass; that highway patrolmen were forced to hold up traffic traveling in a westerly direction to permit turning of the slow moving traffic across the North lane of the highway and into the plant entrance; that "the traffic coming from Tyler was blocked considerably"; that there was a similar slow-down of automobiles leaving the plant at the end of the work day; that "the vehicles were held up repeatedly, both before and after 8:00 A.M."

With reference to the particular conduct of relators on October 17th: "Mr. Beall and Mr. Pierce walked the picket line in a very erratic manner, to my way of thinking, slowing at times, holding up traffic as a consequence. Going through certain gyrations. * * * Mr. Beall seemed to be having leg trouble at times. He would reach down and rub his leg and then look over at the audience across the street and there would be applause more or less from there. * * He was in front of automobiles that were being held up, trying to leave in the afternoon—leave the plant. * * Mr. Beall had leg trouble. At occasional intervals he would stop and hold his leg and raise it and knead the muscles; and he also had some extremely short walking right in front of cars, stopped, turned back a couple of paces, stopped again, stop—back and forth repeatedly. * * * Mr. Pierce also went through actions that were quite interesting. Everyone seemed to be watching them because of the fact that they

did have these troubles in walking picket line. * * * Mr. Pierce, he also held up traffic. At one time, dropping his sign, as I recall it, right in front of the vehicles, reaching over slowly and picking it up; and also indicating it hurt his back, and holding over like this, and again to the cheers from across the street—traffic being held up all this time. * * And Mr. Pierce, as I recited I believe earlier, dropped his sign at one time and seized his side as though he had been injured, or had pulled a muscle or something like that, and stopped the traffic at that time. * * They were among our slowest pickets, Judge."

A newspaper reported attended an early morning rally of striking employees on the morning of the 17th. At the rally he saw Pierce hold up what he identified as the restraining order and heard him refer to it as "a piece of trash." He also heard Pierce state at the rally that the district judge who issued the restraining order "had been bought and paid for by General Electric."

The restraining order had been granted by the regular judge of the 114th Judicial District. The contempt trial was conducted by a visiting judge. Relators could not be punished for what was said at the rally because they were not cited for contempt on that ground, but the trial judge had the right to consider what was said by Pierce at the rally as shedding light on the conduct of relators in the picket line—whether the injured leg and the strained back were simulated or real, and whether the deliberate pace of the pickets was the product of a contemptuous attitude.

Relators are remanded to the custody of the Sheriff of Smith County until released according to the terms of the judgment of contempt.

(Signed) ROBERT W. CALVERT

Robert W. Calvert,
Chief Justice.

RWC:bds.

Associate Judge Steakley not sitting.

Opinion delivered:

January 11, 1961.

A-58

In the

SUPREME COURT OF TEXAS

No. A-8094

EX PARTE

JAMES PIERCE AND RAYMOND J. BEALL

ORIGINAL HABEAS CORPUS

January 11, 1961.

This cause came on to be heard on petition for writ of habeas corpus filed herein on November 3, 1960, and the same, together with the record and briefs and argument of counsel having been duly considered, because it is the opinion of the Court (Associate Justice Steakley not sitting) that the judgments of contempt entered in Cause No. 60-739, General Electric Company vs. International Union of Electrical, Radio and Machine Workers, AFL-CIO, et al., in th 114th District Court of Smith County, Texas, by Looney E. Lindsey, Judge Presiding, on November 3, 1960, were valid judgments, and that the writs of commitment issued in pursuance thereof, on the same date, were valid writs, it is therefore *adjudged*, *ordered* and *decreed* that the order entered in the minutes of this Court on November 3, 1960,

granting writ of habeas corpus, be, and hereby is, set aside, and that relators, James Pierce and Raymond J. Beall, be, and hereby are, remanded to the custody of the Sheriff of Smith County, Texas, to be held and confined in accordance with the terms of the aforesaid judgments of contempt and writs of commitment issued in pursuance thereof.

It is further ordered that relators, James Pierce and Raymond J. Beall, and the sureties on their respective appearance bonds, Thomas G. Pollard, Jr., and M. G. Harmon, pay all costs in this cause expended and incurred in this Court, and that the Clerk of this Court issue the necessary writ, or writs, re-committing relators to the custody of the Sheriff of Smith County, Texas, as above provided.

* * * * *

A-60

MOTION FOR REHEARING CAUSE

No. A-8094

In the

SUPREME COURT OF TEXAS

EX PARTE

JAMES PIERCE AND RAYMOND J. BEALL

RELATORS' MOTION FOR REHEARING AND ARGUMENT IN SUPPORT OF MOTION FOR REHEARING

MULLINAX, WELLS, MORRIS & MAUZY,
By: L. N. D. WELLS, JR.,
1601 National Bankers Life Bldg.,
Dallas 1, Texas,
Attorneys for Relators.

FILED
In Supreme Court
Of Texas
Jan. 25, 1961
GEO. H. TEMPLIN, Clerk
By Deputy

A-61

No. A-8094

In the

SUPREME COURT OF TEXAS

EX PARTE

JAMES PIERCE AND RAYMOND J. BEALL

RELATORS' MOTION FOR REHEARING AND ARGUMENT IN SUPPORT OF MOTION FOR REHEARING

MOTION FOR REHEARING

JAMES PIERCE and RAYMOND J. BEALL (herein called Relators) move the Court to rehear, reconsider and withdraw its Opinion and judgment rendered January 11, 1961, denying relators' writs of habeas corpus, and remanding them to the custody of the Sheriff of Smith County; and pray that upon rehearing they be granted writs of habeas corpus and discharged from custody, and as cause therefore would show:

1.

The Court erred in its statements of relators' contentions.

2.

The Court erred in deciding a federal question (whether federal legislation pre-empted the power of a state court to jail a laborer for engaging in peaceful picketing which delayed ingress to an industrial plant manufacturing goods for interstate commerce) in a way in conflict with applicable decisions of the Supreme Court of the United States, notably *Youngdahl v. Rainfair*, 355 U. S. 131.

3.

The Court erred in deciding a federal question (whether laborers are denied rights of publication guaranteed by the First Amendment to the Constitution by being jailed for peaceful picketing at a slow and deliberate pace with banners truthfully proclaiming the existence of a strike, which picketing had the effect of delaying the entrance of 25 or 30 automobiles entering the plant of an employer with whom the pickets were in dispute) in a way in conflict with applicable decisions of the Supreme Court of the United States, notably *Thornhill v. Alabama*, 310 U. S. 88; *Cafeteria Employees v. Angelos*, 320 U. S. 293; *Chauffeurs etc. Union v. Newell, d/b/a Eldorado Dairy*, 356 U. S. 341.

4.

The Court erred in deciding a question of federal constitutional law (whether the jailing of workers on charges of "unlawfully delaying * * *" and "unlawfully obstructing * * *" and the finding of "unlawfully delaying * * *" and "unlawfully obstructing * * * " and thus violation of an in-

junction which forbade "unlawfully delaying * * *" and "unlawfully obstructing * * *" constitutes such vagueness, generality and lack of specification as to amount to denial of procedural due process in violation of the Fifth, Sixth and Fourteenth Amendments) in a way in conflict with applicable decisions of the Supreme Court of the United States, notably *Raley v. Ohio*, 360 U. S. 423, 438; *United States v. Cardiff*, 344 U. S. 174, 176; *International Harvester v. Kentucky*, 234 U. S. 216, 221-224; *Connally v. General Construction Co.*, 269 U. S. 385, 391; *Winters v. New York*, 333 U. S. 507; *Lanzetta v. New Jersey*, 306 U. S. 454.

5.

The Court erred in holding that there were findings and evidence sufficient to support the Contempt Judgment.

WHEREFORE, relators pray for rehearing, for further oral argument before this Honorable Court, and upon rehearing, for issuance of writs of habeas corpus discharging relators.

Respectfully submitted,

MULLINAX, WELLS, MORRIS & MAUZY,

By: L. N. D. WELLS, JR.,

1601 National Bankers Life Bldg.,
Dallas 1, Texas,
Attorneys for Relators.

In the

SUPREME COURT OF TEXAS

No. A-8094

EX PARTE

JAMES PIERCE AND RAYMOND BEALL

ORIGINAL HABEAS CORPUS

Motion of relators, James Pierce and Raymond J. Beall, for rehearing, filed in the above and entitled cause on January 25, 1961, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

No. ———

In the

Supreme Court of the United States

OCTOBER TERM 1960

EX PARTE

JAMES PEARCE AND RAYMOND J. BEARE

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 888

In the

Supreme Court of the United States

OCTOBER TERM 1960

EX PARTE

JAMES PIERCE AND RAYMOND J. BEALL

On Petition for Writ of Certiorari

to the

Supreme Court of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioners attack the opinion of the Supreme Court of Texas rendered January 11, 1961, denying to them Writs of Habeas Corpus. The opinion is reported at *342 S. W. 2d 429*. Petitioners report all of the Trial Court's orders adjudging them in contempt but have omitted the written Orders of Commitment issued by the Clerk of the 114th Judicial District Court of Smith County, Texas. (Tr. pp. 86-112.) No attack is made here by Petitioners on the sufficiency of the Orders of Commitment.

JURISDICTION

This Court should not grant the Petition for Certiorari or assume jurisdiction because:

(a) The matters complained of in the Petition raise no new Federal questions and Petitioners' contentions have been foreclosed by the decisions of *Youngdahl v. Rainfair (1957), 355 U. S. 131, 2 L. ed. 2d 151, 78 S. Ct. 206,* and *United Automobile A. A. & A. I. W. v. Wisconsin Employment Relations Board (1955), 351 U. S. 266, 100 L. ed. 1162, 76 S. Ct. 794.*

(b) The Federal Labor Laws have not pre-empted the field over the matters complained of below since the methods used by Petitioners and others in conducting the strike were calculated to and did provoke violence, threats of violence and obstructed the free use of the streets adjacent to Respondent's place of business and the free ingress and egress to and from that property, over all of which conduct a State Court has discretionary power to enjoin.

(c) The trial court's adjudications of contempt for violation of a valid temporary restraining order, authorized by *Youngdahl* and *United Automobile*, supra, were affirmed by the Supreme Court of Texas, as amply supported by evidence of Petitioners' conduct in unreasonably delaying the entrances and exits of vehicles into and from Respondent's premises and the obstruction of traffic on State Highway 110 so as to create a menace and danger to the health and safety of the citizens of the State.

(d) Subsequent to the entry of the Judgments of Contempt and Orders of Commitment, Petitioners, acting by and

through their attorney of record, voluntarily paid the fines and court costs imposed on them by the Judgments of Contempt and their action in so doing renders moot the questions presented in the Petition.

STATUTES, CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

In addition to the matters contained in the Petition for Certiorari the relevant Texas Rules of Civil Procedure involved are Rules 680 and 683.

STATEMENT

The statement of the case made by Petitioners is grossly incorrect, misleading and does not present the true picture of the background out of which the orders complained of arose.

Based upon a background not only of threats of violence but acts of violence, coupled with actual physical obstruction by Petitioners to vehicles attempting to enter and leave Respondent's premises the trial court, upon proper Affidavit and Bond, issued the temporary restraining order on October 14, 1960, in accordance with the applicable procedural Rules of the State of Texas. (Pet. for Cert. A-1 to A-7.) The application for the temporary restraining order by Respondents was made necessary by reason of a series of violent acts, threats of violence, and serious interference with the free ingress and egress to Respondent's premises. The subsequent Show Cause Order in contempt came about as follows:

Respondent, General Electric Company, owns and operates a plant known and designated as General Electric Company

Air Conditioning Department, located about five miles from the City of Tyler, Texas. It has in its employ approximately 598 employees and approximately 330 of these employees are members of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, and Local 782 of said Union. Petitioner, Raymond J. Beall, is an employee of Respondent and is Chief Steward of Local 782 aforesaid. Petitioner, James Pierce, is a Labor Union Organizer and is the District Representative of the National Union. He is not an employee of Respondent.

At 12:01 o'clock A. M., Sunday, October 2, 1960, the Union put into effect a strike against Respondent Company and said strike continued until October 22, 1960. The Unions and their members, including Petitioners set up picketing procedures at the one automobile entrance into the Respondent's premises. For the first day or two the picketing was peaceable but, thereafter, and up until the time of the issuance of the temporary restraining order certain acts of violence were committed. Respondent charged in its original application for temporary restraining order that Petitioners and other pickets were obstructing the free ingress and egress of vehicles into and from the premises of Respondent; that they were deliberately placing vehicles upon State Highway 110 so as to constitute an obstacle to the free ingress and egress of Respondent's premises; that the pickets were at various times striking vehicles of employees desiring to work upon entering and leaving the Respondent's premises; the pickets were threatening violence against the Respondent and its employees and were provoking violence on the part of officers, agents and employees of Respondent and the

pickets were obstructing or attempting to obstruct the free use of the streets and highway adjacent to Respondent's premises. That certain home picketing had been carried on by them and specifically the homes of three non-striking employees, namely, Joseph Tench, Helen Hutson and James D. Thrasher. These homes were being picketed and the occupants of these homes were being harrassed, threatened and coerced; that Petitioners and other Defendants had, by telephonic communication, threatened, intimidated and coerced employees desiring to exercise their right to work: and that said Defendants by the use of threats of force or violence were attempting to prevent the Respondent's non-striking employees from engaging in a lawful vocation. (Tr. pp. 7-16.)

Respondent's application for a temporary restraining order,[1] effective until a hearing could be had thereon,[2] contained the other necessary allegations entitling it to injunctive relief, pending a hearing. (Tr. p. 12.) This application was properly sworn to by Tom Sproule, the Plant Manager of Respondent. The Honorable Connally McKay, Judge of the 114th Judicial District Court of Sr ith County, Texas, to

[1]Under Texas law temporary restraining orders, as distinguished from temporary injunctions, are authorized without notice upon verified petition, setting out facts showing grounds therefor. The order expires by its terms within a period of time not exceeding ten days unless for g d cause shown the time is extended or unless the party against whom the order is directed consents that it may be extended for a longer period. If a temporary restraining order is granted without notice the application for a temporary injunction is set down for hearing at the earliest possible date and takes precedence over all matters except older matters of the same character. Rule 680, Texas Rules of Civil Procedure.

[2]Upon the hearing as set by the Court in granting a temporary restraining order the Court may, if justified by the evidence presented by applicant, continue the restraint as a temporary injunction which remains in effect until a final hearing in the case at which time a permanent injunction may issue. No temporary injunction is issued without notice to the adverse party but temporary restraining orders may so issue without prior notice. Rules 680, 681, Texas Rules of Civil Procedure.

whom Respondent's application was submitted, entered a Fiat, enjoining and restraining Defendants, including Petitioners, from certain specific acts and conduct, conditioned that Respondent first file with the Clerk of the Court a bond in the sum of $5,000.00, payable and conditioned as required by law. (Tr. pp. 17-21.) This bond was properly executed by Respondent and filed prior to the issuance of the temporary restraining order. (Tr. p. 22.) Thereafter, Petitioner James Pierce was served with the temporary restraining order on October 16, 1960, and Petitioner Raymond J. Beall was served with a copy of the same on October 14, 1960. Petitioners admit notice and service of the temporary restraining order.

In connection with Respondent's claim of violence *prior* to the issuance of the temporary restraining order, Respondent informs the Court that on October 19, 1960, a striking employee-picket, Bobby Few, was charged in the County Court of Smith County, Texas, with the offense of willful destruction of personal property, such alleged offense having been committeed on October 5, 1960. Respondent further shows that on October 17, 1960, one L. W. Presley, a striking employee-picket, was charged in the same Court with the same offense, it being charged that such offense occurred on October 13, 1960. Petitioners will not deny the filing of these charges.

Other acts of violence and threatened violence were proved upon the hearing of the contempt matter. The picketing on the first day of the strike was peaceful. (S. F. p. 88.) But thereafter many incidents occurred on the picket line; Re-

spondent asked for police protection for the vehicles and persons attempting to enter and leave the plant. (S. F. p. 95.) Petitioners have incorrectly stated (Pet. for Cert. p. 11) that no one suggested that the picketing was being improperly conducted. Eleven or twelve State Highway Patrolmen were called to the scene. (S. F. p. 50.) These patrolmen parked along the State Highway from the plant entrance up to a quarter or one-half mile away. (S. F. p. 96.) Violence was observed at the picket line prior to the issuance of the temporary restraining order. Vehicles moving into the premises were struck by the pickets with the signs they carried. (S. F. p. 103.) A Red Ball Motor Freight Truck, seeking entrance to Respondent's Plant was struck with a picket sign with force sufficient to break the staff from the sign. The antennas of the vehicles carrying non-striking employees into and from the plant were struck. One picket attempted to ram his picket sign into the windshield of a vehicle entering the plant. (S. F. p. 103.) Cars entering and leaving the premises were scratched with the signs carried by the pickets. An outside rear view mirror was knocked off and smashed by a picket. (S. F. p. 104.) Thus, with the background of *violence, threats of violence and obstruction of the free ingress and egress* the temporary restraining order issued.

A hearing on Respondent's application for temporary injunction was set for Monday, October 24, 1960, at 10:00 o'clock A. M. Petitioners, having been served with the temporary restraining order and having consulted their counsel in connection therewith, committed the acts for which the contempt charges were brought on Monday, October 17, 1960.

The contempt charges were made returnable likewise on Monday, October 24, 1960, at 9:00 o'clock A. M., at which time all parties appeared and a hearing was had, resulting in the contempt judgments which Petitioners here attack. A hearing on Respondent's application for temporary injunction was not held as scheduled on October 24, 1960, because the strike was settled on Sunday, October 23, 1960, and Respondent's application for temporary injunction as well as Defendants' and Petitioners' Motion to Dissolve became moot. However, at the time of the contumacious conduct on the part of Petitioners the temporary restraining order was in full force and effect.

On Monday morning, October 17, 1960, the Unions had scheduled a giant rally on property belonging to them, located about 200 yards from Respondent's premises. This rally began at about 6:00 o'clock A. M. (S. F. p. 22.) One of the main speakers at this rally was Petitioner James Pierce, and while making a speech over a public address system at that time held up what he identified as the temporary restraining order which had been issued by Judge Connally McKay and he told the crowd there assembled that the restraining order was a "piece of trash." Petitioner James Pierce further told the crowd, over the public address system, that Judge McKay had been "bought and paid for by General Electric." (S. F. p. 25.) Petitioner Pierce also told the crowd on this occasion that in order to show them what he thought of the restraining order he was going up to Respondent's plant to take a "turn on the picket line." (S. F. p. 56.) Petitioner Raymond J. Beall also attended this rally

and made a speech. Thereafter, the Petitioners, Pierce and Beall, went to the picket line at the entrance of Respondent's premises and Pierce immediately took over one of the picket signs and committed the acts which Respondent charged constituted a violation of the temporary restraining order.[3] Later that day Petitioner Beall also walked the picket line and committed the acts which Respondent charged constituted a violation of the temporary restraining order.[4] The conduct of Petitioners in this regard is vividly and undisputedly shown by Respondent's Exhibit 11 offered in evidence in the trial court, which exhibit consists of approximately 1000 feet of moving pictures. These moving pictures, under order of the Supreme Court of Texas, have been transferred and are now at the disposal of this Honorable Court. It is Respondent's request that this Honorable Court view these moving pictures.

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[3]It was charged that Petitioner Pierce did on October 17, 1960, (1) unlawfuly obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas; (2) unlawfully delay the entrances and exits of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas; (3) obstruct and attempt to obstruct the free use of the streets and highways adjacent to the Company's place of business and he did obtruct the free ingress and egress to and from the Company's premises; and (4) unlawfully obstruct the traffic on State Highway 110 in front of the Company's premises so as to create a menace and danger to the health and safety of the citizens of this State traveling upon and using State Highway 110. (Tr. pp. 51-52.)

[4]It was charged that Petitioner Beall did on October 17, 1960, (1) unlawfully obstruct the free ingress and egress of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department, located on the Troup Highway, Smith County, Texas, being the premises now picketed; (2) unlawfully delay the entrances and exits of vehicles and persons into and from the premises of General Electric Company Air Conditioning Department located on the Troup Highway, Smith County, Texas; and (3) obstruct and attempt to obstruct the free use of the streets and highway adjacent to the Company's place of business and he did obstruct the free ingress and egress to and from the Company's premises. (Tr. pp. 46-47.)

The conduct of Petitioners on October 17, 1960, which is made the basis of the contempt charges is also shown by some of the testimony elicited upon the hearing:

HIGHWAY PATROLMAN BOB NOLAN (S. F. pp. 37-29):

"Q. Did you have an occasion to observe Mr. Pierce [Petitioner] there on that occasion?

"A. Yes, sir.

"Q. State whether or not he was one of the pickets that picketed the plant there at that time?

"A. Yes, he did.

"Q. Will you please describe to the Court the manner in which he picketed the place. as to whether or not any vehicles were obstructed? Their entrance into the plant?

"A. Yes, the vehicles were obstructed into the plant. They would walk their picket, and one car would go through, and they would walk across and the next car would have to stop and wait for the pickets to move before they could go through.

"Q. Did you observe the condition of the highway, Mr. Nolan, as to whether or not traffic backed up on that highway?

"A. Yes, it was.

"Q. Could you estimate for the Court about what number of vehicles were stacked up on that occasion, from time to time?

"A. The vehicles were over the little hill there and were out of sight. We could see approximately 30 or 40 cars in sight that were stacked up on the highway.

"Q. How long did Mr. Pierce continue to do that, if you recall?

"A. I would say thirty or forty minutes maybe.

"Q. On that occasion did you have to direct traffic yourself?

"A. Yes, sir.

"Q. Why?

"A. I was advised to by my superior officer.

"Q. And when you started directing traffic, what were you trying to do with reference to the vehicles on the highway?

"A. We were trying to stop the cars coming from Troup, coming—on the highway coming from Troup, to keep from maybe having an accident out there. That was our primary interest, to hold down the accidents."

(By Counsel Wells) (S. F. 41):

"Q. Then, as far as you have observed, everything out there has been peaceable?

"A. In what respect?

"Q. Well, in any respect.

"A. Everything *except the traffic*, yes."

(By Counsel Flock) (S. F. 45):

"Q. Did Mr. Pierce delay any of the traffic getting in that morning?

"A. Yes.

(By Counsel Wells) (S. F. 45):

"Q. How did he delay it?

"A. By walking in front of the cars."

HIGHWAY PATROLMAN TOM ARNOLD (S. F. pp. 58-60):

"Q. Did you see either or both of them [Petitioners] out there last Monday morning [October 17, 1960] on the picket line?

"A. Yes, sir.

"Q. Was any traffic stopped in front of the pickets?

"A. Yes, sir.

"Q. Please describe the condition of the highway as to whether or not there was any traffic blocked, etc.

"A. Yes, sir, the traffic coming from Tyler to the plant was blocked considerably. I was standing in the middle of the highway and cars were stacked up as far as I could see. I would estimate 25 or 30 cars, as far as I could see, and over the hill out of sight.

"Q. Did that occur while Mr. Pierce and Mr. Beall were doing the picketing?

"A. Yes, sir.

"Q. Did you have anything to do with trying to move the traffic inside?

"A. Yes, sir.

"Q. What did you do?

"A. Well, we attempted to move the traffic on into the plant.

"Q. Did you have any difficulty doing that?

"A. Yes, sir, the pickets still continued to walk in front of the cars."

(By Counsel Wells) (S. F. p. 63):

"Q. Did anything more than that happen? If it did, tell the Judge about it.

"A. Well, our main concern was the traffic problem, and the pickets walked so slow in front of the cars that it allowed the cars to stack up on the highway."

(By Counsel Flock) (S. F. p. 65):

"Q. Mr. Arnold, on this occasion, could you estimate in distance how far the traffic was backed up back towards Tyler that morning?

"A. No, sir, I couldn't see the back end of the line. As far as I could see, I would estimate 20 or 30 cars, something like that."

J. M. WINEMILLER (S. F. pp. 69-71):

"Q. Did you have occasion to see either or both [Petitioners] of those men last Monday morning, or on Monday, October 17, 1960?

"A. On Monday, yes, sir.

"Q. What did you see James Pierce doing, if anything?

"A. He walked the picket line the morning of the 17th.

"Q. Did you see Mr. Beall?

"A. I don't recall him in the morning, I do in the afternoon.

"Q. What did he do in the afternoon?

"A. Walked the picket line.

"Q. All right, did you observe if there was any difficulty of traffic entering or leaving the plant on that day?

"A. Yes, sir.

"Q. Was there?

"A. There was.

"Q. Did you observe the manner in which Mr. Pierce and Mr. Beall, whenever they walked the picket line on that day, the manner in which they did walk it?

"A. Yes, sir.

"Q. Will you please describe it to Judge McKay?

"A. Yes, sir. Judge, the two pickets, Mr. Beall and Mr. Pierce, walked the picket line in a very erratic manner, to my way of thinking, slowing at times, holding up traffic as a consequence. Going through certain gyrations. I recall distinctly Mr. Beall seemed to be having leg trouble at times. He would reach down

and rub his leg and then look over at the audience across the street and there would be applause more or less from there.

"Q. Now, when that was happening, where was he with reference to the traffic?

"A. He was in front of automobiles that were being held up, trying to leave in the afternoon—to leave the plant. Mr. Pierce, he also held up traffic. At one time, dropping his sign, as I recall it, right in front of one of the vehicles, reaching over slowly and picking it up; and also indicating it hurt his back, and holding like this, and again to the cheers from across the street—traffic being held up all of this time. They were among our slowest pickets, Judge.

"Q. Now, with reference to the amount of traffic held up, can you estimate for the Judge about how far up the highway, if it was up the highway, that traffic was held up?

"A. Yes, sir, I can. There was in the morning, of course, vehicles, a string of fifteen or more upon more than one occasion, which would—perhaps a quarter of a mile would be my best estimate.

"Q. Did you observe any traffic approaching from the cities of Troup and Whitehouse?

"A. Yes, sir.

"Q. State what the facts are as to whether or not any of that traffic was held up?

"A That traffic was held up on Monday, the 17th, in the morning also. It vanished behind the trees. I couldn't see how far down the road it went; but there were a number of vehicles held up.

"Q. Now, do you know whether or not those vehicles were intending to enter the plant of General Electric, or was that the general traveling public?

"A. I would say both.

"Q. Both. You saw that on that occasion?

"A. Yes. Some came in and some went on, when they could get through."

(By Counsel Wells) (S. F. p. 78):

"Q. And you saw that the Highway Patrolman had that traffic situation under control, didn't you?

"A. I wouldn't say he had it under control at all. No, sir.

"Q. In what respect did he not have it under control?

"A. May I describe it?

"Q. Sure.

"A. The Highway Patrolman entered the scene after the traffic had been slowed for many vehicles up the road. The Highway Patrolman came on the scene. Incidentally, we have motion pictures—and attempted to move the traffic in, as we could very well see— indicating, go here, go there, blowing the whistle we could hear. At the same time, the pickets would not move aside for the vehicles, and the vehicles were held up repeatedly, both before and after 8:00 A.M.

"Q. Now, did the Highway Patrolman ask a single picket to move?

"A. I cannot say if he did or did not. I was on the roof.

"Q. Did you see any pickets stop in front of the vhicles, or were they walking all the while?

"A. I saw pickets stop in front of the vehicles."

Petitioner Pierce deliberately and intentionally held up for approximately seven minutes the vehicle of witness Max

A. Williams who desired to enter Respondent's premises. (S. F. pp. 108-109.)

"Q. Please describe to the Court the manner in which they walked the picket line that afternoon?

"A. Mr. Pierce and Mr. Beall were walking from east to west. I believe you have it marked on your map there. Mr. Beall would step out in front of my car and walk from fender to fender, making it impossible for me to pass. And I sat and waited until I got a chance to pass between the pickets. Finally there was an opening. I started through, and Mr. Pierce politely bowed, and I nodded my head and passed through the picket line." (S. F. p. 111.)

LOIS BROWN (S. F. pp. 128-131):

"Q. Directing your attention, Mrs. Brown, to last Monday, October 17, 1960, do you recall coming to work that morning?

"A. Yes, sir.

"Q. Mrs. Brown, are you acquainted with, or do you know who this is? Mr. James Pierce?

"A. Yes.

"Q. Do you know Mr. Raymond Beall, the man there?

"A. Yes.

"Q. That morning, as you arrived, did you see James Pierce there at the entrance?

"A. Yes, sir.

"Q. What was he doing?

"A. He was picketing the entrance.

"Q. Picketing. Did you observe Mr. Pierce and the manner in which he was walking the picket line?

"A. Yes.

"Q. Please describe to the Court just what it was, just what he was doing?

"A. He was walking very slowly back and forth in front of my car.

"Q. Did he stop your car?

"A. Yes.

"Q. How long was your car stopped, there, if you recall?

"A. Two or three minutes.

"Q. And then while your car was stopped, what would Mr. Pierce be doing?

"A. Walking slowly in front of my car.

"Q. Miss Brown, I will ask you whether or not you left the plant that afternoon in your own vehicle?

"A. Yes, sir.

"Q. Did you notice Mr. Beall on that occasion?

"A. Yes, sir.

"Q. What was he doing?

"A. He was picketing real slow in front of my car.

"Q. Did he stop your car?

"A. Intentionally, yes.

"Q. All right.. Do you know how long you were stopped there?

"A. Three or four or five minutes, the maximum.

"Q. As you approached the gate to leave, did you want to go home?

"A. Yes, sir.

"Q. Did you leave the premises of General Electric?

"A. Yes, sir.

"Q. And what kept you from doing so immediately?

"A. I couldn't get out because of Ray Beall and Jim Pierce holding my car."

(By Counsel Wells) (S. F. pp. 136-137):

"Q. Oh, you have to do that. How many times did Jim Pierce walk in front of your car before you went through?

"A. I didn't count them.

"Q. I believe you testified, if I understand you, that at that time the traffic policeman was there, at the time you got up to where the picket was. Am I correct about that?

"A. I stopped and couldn't get through. The Highway Patrol walked up and let us go through."

Witness William Burk, a photographer, on October 17, 1960, took approximately 1,000 feet of movies clearly depicting Petitioners' conduct on the picket line. These movies, marked "Plaintiff's Exhibit 11" have been forwarded along with the record in this case and are now before this Court. Respondent requests that the Court observe these movies at 24 frames per second, the speed at which they were taken. (S. F. p. 147.)

THOMAS SPROULE (S. F. p. 170):

"Q. All right, sir, prior to the strike, and prior to October 2, 1960, what are the facts as to whether or not there was any difficulty in traffic entering and leaving your premises, or the premises of General Electric?

"A. To my knowledge, I have never seen it stack up. Of course, I did not observe it as closely as I have lately, but I don't recall anybody ever being held up the way we have been held up."

(S. F. pp. 171-173):

"Q. Will you describe what you observed there in anything that Jim Pierce would do by way of delaying traffic? On last Monday I am talking about now, October 17th.

"A. He walked in a very, very slow manner. Took very short steps.

"Q. At the time when he was on the picket line on last Monday, October 17th, did you observe if there was any stacked traffic?

"A. Yes, sir.

"Q. What are the facts as to whether or not there was?

"A. At certain times there was stacked traffic in both directions. Toward Troup I would estimate maybe six or seven cars at a time; and from the Tyler direction I counted up as high as 33 cars on one occasion.

"Q. Would those cars be stopped?

"A. Yes, sir.

"Q. Why would they be stopped?

"A. Because they were prevented from turning into the plant because of two reasons. One, there was traffic coming from Troup, and secondly and mainly, because the car in front of it could not get into the plant entrance, and could not block up this other lane of the highway until the Highway Patrolman came. Then, when he came, he motioned in and would block up the other lane of the highway and in turn that would put the jam-up coming from Troup, and it was a slow process as cars went in, so as to build up in both directions.

"Q. Did that condition exist while Jim Pierce was on the picket line?

"A. Yes, sir.

"Q. Referring to last Monday, October 17th, on which you stated the Highway Patrolman got out and actually directed traffic, was that the only instance you can think of when they actually got out and directed the traffic themselves?

"A. Yes, sir."

(By Counsel Flock). (S. F. p. 182.)

"Q. And were Mr. Pierce and Mr. Beall impeding the ingress and egress into and from the plant?

"A. In the afternoon, both of them were.

"Q. In the morning, was Mr. Pierce impeding the free ingress and egress into and from the plant?

"A. Yes, sir."

It was further shown that prior to the strike with 350 to 380 production employees quitting at 3:30 P.M. it took only seventeen minutes as the maximum for all of the vehicles to clear Respondent's premises. During the strike the maximum number of workers, including both hourly employees and office workers (only 46 of the production or hourly employees remained at their jobs after the strike began) was 283 and the time consumed was 40 minutes. This was true on Monday, October 17, 1960, the date of the alleged offenses. (S. F. pp. 304-306.)

Petitioners infer that Respondent did not open the second gate because such action would give the employees a second place to picket. (Pet. for Cert. p. 13.) The truth is that the second gate at no time *before* or *after* the strike had been opened for plant traffic. (S. F. p. 166.)

ARGUMENT

A. Pre-Emption.

Although Petitioners in the trial court first took the position that the Court was without jurisdiction to enter the temporary restraining order (Tr. p. 27), in subsequent argument before the Supreme Court of Texas, and now before this Court, Petitioners concede that the trial court had jurisdiction to enter the restraining order. (See Relator's Motion for Rehearing before the Supreme Court of Texas.) Petitioners further admit, as indeed they must, that the restraint as written by the trial court did *not* forbid peaceful picketing but now argue that the restraint as interpreted and applied in the Courts below prohibited "peaceful picketing." Thus, what Petitioners are saying is that their conduct in stacking up traffic on a State Highway for a quarter of a mile, intentionally and deliberately blocking the entrance to Respondent's plant, walking back and forth in front of, but not completely clearing vehicles seeking entrance to Respondent's premises, delaying ingress and egress into and out of Respondent's premises, all of such conduct being in direct violation of the trial court's restraining order, was "peaceful picketing," immune to State action. If such conduct is held to be "peaceful picketing" and, therefore, not subject to State proscription then no longer can a State exercise its historic power over such traditionally local matters as public safety and order, in the use of streets and highways. *Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 86 L. Ed. 1154, 62 S. Ct. 820.*

The National Labor Relations Act, prior to its amendment by the Labor Management Relations Act, was held not to be designed to preclude a State from enacting legislation limited to the prohibition or regulation of mass picketing, threats to employees desiring to work, physical injury or property damage, obstruction of the place to work, physical injury or property damage, obstruction of the place to work, obstructing streets and public roads surrounding such place, and picketing the homes of employees. *Allen Bradley Local, U. E. R. N. W. v. Wisconsin Employment Relations Board*, supra.

Following the amendment of the National Labor Relations Act by the present Labor Management Relations Act this Court held in *United Automobile, A. & A. I. W. v. Wisconsin Employment Relations Board, 351 U. S. 266, 100 L. Ed. 1162, 76 S. Ct. 794*, that a State had power to enjoin violence in connection with conduct such as mass picketing, *interfering with the free and uninterrupted use of public ways*, preventing persons desiring to be employed by the employer from entering its plant, coercing employees who desire to work and threatening them and their families with physical injury. The *Allen Bradley* decision, supra, was held to be controlling.

The Court further held that the Labor Management Relations Act did not give the *exclusive* method of controlling violence since the State interest in law and order precludes such interpretation. Quoting from the opinion this Court stated:

> "As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin

> conduct which has been made an unfair labor practice under Federal Statutes. But our post Taft-Hartley opinions have made it clear that this general rule does not take over from the States power to prevent mass picketing, violence and overt threats of violence. The *dominate interest of the State in preventing violence and property damage cannot be questioned. It is a matter of general local concern * * *. The States are the natural guardians of the public against violence. It is the local communities that suffer the most from the fear and loss occasioned by coercion and destruction. We should not interpret an Act of Congress to leave powerless to avert such emergencies without compelling directions to that effect.*

The temporary restraining order in this case and the judgments of contempt based thereon are clearly authorized by the settled law as stated in this Court's decision of *Youngdahl v. Rainfair, 355 U. S. 131, 2 L. Ed. 2d 15, 78 S. Ct. 206.* In that decision this Court upheld a State Court injunction enjoining strikers from "threatening, intimidating or coercing any of the officers, agents or employees at any place" and from "*obstructing or attempting to obstruct the free use of the streets adjacent to the employer's property and the free ingress and egress to and from the employer's property.*"[5]

It is clear from the record made below that the contumacious conduct of Petitioners in "taking a turn on the picket line" to show the crowd what they thought of the injunction described by Pierce as a "piece of trash" was not delay reasonably incident to peaceful picketing. Therefore, such conduct, being in direct violation of the trial

[5]Cf. Paragraph 6 of the restraint in the case at bar, quoted infra p. 26.

court's valid restraining order was punishable as for contempt.

B. Free Speech.

Picketing is, of course, an aspect of free speech protected by the First Amendment and withdrawn by the Fourteenth Amendment from encroachment by the States. However, picketing is something *more* than free speech; it is free speech plus. It is the plus factor that takes picketing out of the realm of free speech and subjects it to restructions. *Hughes v. Superior Court of California, 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950).*

In the case before the Court the plus factor that deprives Petitioners' picketing of its Constitutional protection is the resulting unreasonable obstruction of the free ingress and egress to Respondent's plant, rendering the use of the public streets and highway adjacent to Respondent's place of business dangerous to the health and safety of the citizens of the State of Texas. The trial court did not attempt to prohibit Petitioners from disseminating the facts of the labor dispute. All that were restrained were acts of violence and obstruction. The right to peacefully picket Respondent's plant was recognized and not proscribed.

Petitioners argue that to place restrictions upon their alleged right to obstruct free ingress and egress is to place undue limitation on the right to picket, thus depriving them of their Constitutional guaranty of free speech. Such argument ignores the fact that picketing which results in unreasonable obstruction of the free ingress and egress, impair-

ing the health and safety of the citizens of the State in thier use of the public ways is *not* the legal equivalent of free speech and is, therefor, not entitled to Constitutional protection. Thus it is the manner in which the picketing was conducted which gives ground for its disallowance. "The power and duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted." *Thornhill v. Alabama, 310 U. S. 88, 84 L. ed. 1093, 60 S. Ct. 736 (1940).*

Petitioners rely on cases not applicable to the case at bar. In *Thornhill v. Alabama*, supra, the State, by Statute, sought to prohibit all picketing without regard to the type of picketing conducted. This Court held that such a Statute, which effectively prohibited all means usable in publicizing the facts of a labor dispute, violated the Constitutional guaranty of free speech and of the press. In *Cafeteria Employees v. Angelos, 320 U. S. 293, 88 L. ed. 58, 64 S. Ct. 126 (1943)*, the trial court enjoined the Petitioners in broad terms from picketing at or near Respondent's place of business. The restraint in effect banned all picketing. The picketing was admittedly peaceful, there being no evidence that the pickets tried to interfere with the rights of free ingress and egress into Respondent's premises, or that the highways or public ways were obstructed by the picketing. There is no factual similarity between the above two cases upon which Petitioners rely and the case at bar in that Petitioners themselves admit that the trial court did not attempt to ban picketing.[6]

[6]Petitioners, in their Petition, state as follows: "the restraining order by its terms does not ban picketing. It was admitted that picketing was not prohibited." (Pet. for Cert. p. 22.)

C. Due Process.

Petitioners argue that their violations of the trial court's restraining order may have been justified by alleged uncertainty as to the conduct restrained. Paragraph (6) of the restraining order forbade Petitioners from "threatening violence against Company and its employees and provoking violence on the part of the officers, agents and employees of Company, and from obstructing or attempting to obstruct the free use of the streets and highway adjacent to Company's place of business and obstructing the free ingress and egress to and from Company's premises." This language with clarity informed the Petitioners as to the conduct restrained and it was so held by the Supreme Court of Texas against attack by Petitioners as being too vague and indefinite as to give fair notice. That Court stated that, "Except for the use of the word 'unlawfully' the language used by the trial court is almost identical with that used in restraining similar conduct in *Youngdahl* and *United A. A. & A. I. W.*, supra, * * *. We interpret the trial court's use of the word 'unlawfully' as indicating that the conduct restrained was regarded by the court as being unlawful."[7] (Appendix to Pet. for Cert. p. A-52.) A plea of uncertainty or vagueness as a defense to prosecution for contempt is largely a matter of State law[8] since the Federal Constitution does not require the definitive resolution of collateral questions as a condition precedent to a valid contempt conviction. *Regan v. New York, 349 U. S.*

[7] Paragraph 6 of the restraining order, quoted above does not contain the word "unlawful" or "unlawfully."

[8] Rule 683, Texas Rules of Civil Procedure requires that every restraining order set forth the reasons for its issuance, be specific in its terms and describe in reasonable detail the acts sougth to be restrained.

58, 99 L. ed. 883, 75 S. Ct. 585 (1955). Assuming the Petitioners were in doubt as to the acts proscribed by the restraining order a decent respect for the authority of the Court dictated the propriety of an appeal to it for the solution of any doubt rather than violating the order through their own construction of the language. It is submitted that the degree of certainty and definiteness required by State law and the Federal Constitution is more than satisfied by the trial court's restraining order. It matters not that the Petitioners were left at their peril to guide their actions on the picket line in the light of what the trial court had restrained for even though "the law strives to provide predictability so that knowing men may wisely order their affairs; it cannot, however, remove all doubts as to the consequence of a course of action." *Regan v. New York*, supra.

This Court in *United A. A. & A. I. W. v. Wisconsin Employment Relations Board*, supra, did not question the definiteness or clarity of a restraining order enjoining and restraining Defendants from "obstructing or interfering in any way with entrance to and egress from the premises of Kohler Company" and from "obstructing or interfering with the free and uninterrupted use of public roads, streets, highways, railways or private drives leading to the premises of the Kohler Company." And in *Youngdahl v. Rainfair* supra, this Court did not question the definiteness or the clarity of a restraining order enjoining or restraining the Defendants from "obstructing the free use of the streets adjacent to the employer's property."

D. Moot Question.

The Petitioners, after the contempt judgments were signed and orders of commitment issued and while in the custody of the Sheriff of Smith County, State of Texas, *through their attorneys of record voluntarily paid* the fines and court costs imposed upon them by the trial court. The Sheriff accepted the payments, gave Petitioners a receipt therefor and at no time requested or demanded that Petitioners or their attorney make such payment. (Supp. Tr. p. 11.) The Sheriff then, in his official capacity, turned the payment over to the District Clerk of Smith County, Texas. The District Clerk at no time requested or demanded that Petitioners, or their attorney, pay the fines or court costs. (Supp. Tr. p. 12.)

The action of Petitioners in voluntarily paying their fines has left nothing upon which a judgment of this Court can operate. It is well settled that this Honorable Court will not proceed to adjudication in such a case. *Ex Parte Baez, 177 U. S. 378, 44 L. ed. 813 (1900).* By satisfying the judgments of the trial court, insofar as payment of the costs and fines are concerned, Petitioners have recognized the finality of the judgments of contempt, and therefore, leave moot any legal questions involved.[9] "A Federal Court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants before it." *St. Pierre v. U. S.,*

[9]The trial court imposed a $100.00 fine and a three-day jail term on Petitioner Pierce and $100.00 and a two-day jail term on Petitioner Beall. The fines have been paid, but the jail terms have not been completely served. However, the payment of the fines admits the finality and validity of the whole judgment and renders further proceedings purposeless and moot. *State v. Mass.*, 90 Kan. 129, 132 P. 1182 (1913); *People v. Pyrros*, 323 Mich., 329, 35 N. W. 2d 281 (1948); *Commonwealth v. Dixon*, 270 S. W. 2d 167 (Ky. Ct. App., 1954).

319 U. S. 41, 81 L. ed. 1199, 63 S. Ct. 910 (1943); accord, Bergdoll v. U. S., 279 F. 404 (3rd Cir., 1922). Petitioners should not now be heard to contend that the judgments have not been satisfied. It is inconsistent to yield a voluntary obedience to a judgment of a court and afterward appeal therefrom.

(All emphasis throughout this brief has been supplied by the writer.)

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be DENIED.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

No. 888

In the

Supreme Court of the United States

OCTOBER TERM 1960

EX PARTE
JAMES PIERCE AND RAYMOND J. BEALL

On Petition for Writ of Certiorari
to the
Supreme Court of Texas

PETITIONERS' REPLY
TO
BRIEF FOR RESPONDENT IN OPPOSITION

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The artfully drawn Opposition, in its first twenty pages, while not saying so specifically, seeks to leave the impressions (1) that the picketing at issue was violent and threatening,[1] and (2) that the application merely raises disputed issues of fact.

[1]Thus the Opposition asserts (p. 2) that "the methods used by Petitioners and others in conducting the strike were calculated to and did provoke violence". Respondent's "Statement" at pp. 3-9 puts the case in a context "not only of threats of violence, but acts of violence, coupled with actual physical obstruction * * *" and asserts "a series of violent acts, threats of violence, and serious interference with free ingress and egress * * *" etc.

[2]See Opposition pp. 8-20, and the lengthy recitals of testimony there contained. Note, however, that the Opposition does not set this out in context, nor does it note qualifying or contradictory testimony by the same witness.

A.

No Violence

Respondent's attempt to put threat or violence in this case occupies substantially all of the first twenty pages of the Opposition. Actually, there is neither pleading, proof nor finding of any post-restraint threat or violence.

The original petition upon which *ex parte* restraint was issued alleged threat and violence. No evidence was ever presented in support of those allegations,[3] for the strike was settled prior to injunction hearing, and the injunction application was thus moot.[4]

The only litigated matter involved actions occurring *after* the issuance of the restraint. It will not do to transform allegations of violence which based the ex parte restraint (all alleged to have occurred *prior* to the restraining order) into violence or threat *after* its issuance.

---

[3]The Opinion of the Supreme Court of Texas (Petition, p. A-50) specifies that the only evidence before the trial judge was the "verified petition". Accordingly, the Opposition's references to criminal charges (Oppos. p. 6) are without basis. While we admit that such charges were filed, if we are to go outside the record it would appear that when the charges were tried before a jury in Smith County Court, defendant Few was acquitted and the charges against Pressley were dismissed.

Similarly, the assertions at Opposition, p. 8, that Pierce made statements at the union meeting maligning the trial judge which evidenced his contempt for the restraint cannot be sustained in the light of subsequent developments. See case No. 61-57, 114th District Court, Smith County, Texas, where Pierce was charged in a separate criminal contempt proceeding with having made such utterances. After full trial he was found "not guilty" of the criminal contempt. See judgment in the cited cause rendered May 10, 1961.

[4]The Opposition acknowledges as much, viz, Opposition, p. 8: "A hearing on Respondent's application for temporary injunction was not held as scheduled on October 24, 1960, because the strike was settled on Sunday, October 23, 1960, and Respondent's application for temporary injunction as well as Defendants' and Petitioners' Motion to Dissolve became moot."

The picketing held contemptuous occurred *after* the restraint, and is wholly devoid of threat or violence. Every witness for the prosecution so testified, and admitted that everyone who desired to enter the plant did so. S. F. 32, 44-45, 64, 73, 117.

Motion pictures of the post-restraint picketing are before the Court—Exhibit 11. These admittedly record the most gross delays, S. F. 157. We join the reiterated suggestion contained in the Opposition[5] that the Court view these pictures which show peaceful picketing at deliberate pace, and make fully clear that no threat or violence is in the case.

It just will not do to suggest that violence or threat is in this case. For the Supreme Court of Texas decided the case, not on findings of threat or violence, but *solely* upon the showing, "that the pace of Pierce and the other morning picket was so slow and deliberate as to back up some 25 or 30 automobiles approaching from Tyler and intending to enter the plant premises; that the interval between the crossing of the pickets and their return was so brief that only one automobile could pass; that highway patrolmen were forced to hold up traffic traveling in a westerly direction to permit turning of the slow moving traffic across the North lane of the highway and into the plant entrance; that 'the traffic coming from Tyler was blocked considerably'; that there was a similar slow-down of automobiles leaving

[5]Opposition, p. 9, "It is Respondent's request that this Honorable Court view these moving pictures * * *". Opposition, p. 18, "Respondent requests that the Court observe these movies at 24 frames per second, the speed at which they were taken."

the plant at the end of the work day; * * *." See Opinion p. A-54-A-55, Appendix to Petition for Certiorari.

B.

No Fact Issues

What we have said above likewise makes clear that there is no fact issue here. Undisputed facts show that the pace of the pickets was slow, that "the interval between the crossing of the pickets and their return was so brief that only one automobile could pass at a time * * *." These facts were found below and are not attacked.

Upon undisputed facts petitioners assert the right in displaying a picket sign to interpose the sign before those entering the struck plant. To inform requires the auditor's attention and, accordingly, a few seconds of his time. When such potential auditors are funnelled through a single entrance the cumulation of the time required to get the message to them results in delay. Such delay, wholly incident to peaceful picketing, is not "unlawful".

C.

Pre-emption

The Opposition really makes our case for certiorari. It asserts (p. 23) that local control of "mass picketing, violence and overt threats of violence" is not pre-empted. We agree.

But we disagree with the Opposition's attempt to equate "obstruction" resulting when only two pickets peaceably proceed at a deliberate pace across the plant entrance, with

"mass picketing, violence and overt threats". By such legerdemain "peaceful picketing" is converted into *per se* violence and overt threats—and the very right to picket is demolished. Unless this Court is to abandon the distinctions between threats, intimidation, coercion and violence, on the one hand, and peaceful picketing on the other reiterated in *Youngdahl v. Rainfair, 355 U. S. 131*, the decisions below (which treat obstruction resulting from the few seconds required to see and evaluate a picket's peaceful message similarly to obstruction resulting from threat, coercion and violence) must be examined and overturned.

If the rationale of the Opposition and the Courts below is accepted the only lawful picketing is that which either nobody sees, or as to which nobody pays any attention. Is picketing pre-empted only as long as no one is influenced by it? Heretofore the distinction between informing and intimidating has been clear. The former is pre-empted. The latter is not. When the courts below obliterate this distinction they conflict with the line of cases culminating in *Youngdahl v. Rainfair, 355 U. S. 131.*

D.

Free Speech

The Opposition argues that the "* * * factor that deprives Petitioners' picketing of its constitutional protection is the resulting unreasonable obstruction of the free ingress and egress to Respondent's plant". Oppn. p. 24.

In the quoted sentence the Opposition has exposed the fallacy in the state court decisions. While giving lip-service to

the constitutional protection of the right of peaceful picketing, actually the decisions below proceed on the theory that picketing loses protection when it is observed and acted upon. But the right of communication involves both the sender and the receiver. The public has an interest in receiving information concomitant with laborers interest in disseminating information. Concern for those legitimate interests requires rejection of the view of the Texas courts which the opposition re-asserts: that picketing is lawful only when it does not delay those who observe it.

The Opposition's assertion that *Thornhill*, *Angelos* and other picketing cases did not involve pickets who interfered with ingress or egress runs counter to both the language of those opinions and the industrial facts of life. Every picket seeks to influence those who observe him to shun the picketed premises. That is the reason for the picketing. If the right to picket is worthy of constitutional protection, such protection necessarily extends to reasonable opportunity for the public to see and act on the picket's message. A denial of such opportunity is a denial of the right to picket.

E.

Due Process

Opposition's attempt to avoid the ambiguity and vagueness of proscription against "unlawfully" obstructing by suggesting that hidden in paragraph 6 of the restraint was an unqualified proscription will not do (Oppos. p. 26). For the Supreme Court of Texas has been explicit that: "only numbered paragraphs (1), (2) and (7) of the Order are impor-

tant to our discussion inasmuch as only the acts there restrained were found in the contempt judgment to have been committed in violation of the Order". See Petition for Certiorari, Appendix, p. A 47. Action questioned as violative only of ambiguous paragraphs 1, 2 and 7 does not involve the restraint set out in paragraph 6.

F.

Alleged Mootness

The assertion of mootness is frivolous. Denial of certiorari means petitioners go to jail.*

WHEREFORE, petitioners respectfully request that writ of certiorari be issued.

Respectfully submitted,

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May 12, 1961.

*Moreover the same mootness argument was made to the State Court and ignored by it. Doubtless the State Court's failure to mention the argument was because it was fallacious both as to fact and law. The facts which Opposition asserts at Oppos. p. 28 are merely alleged by way of affidavit and are controverted by affidavit. Accordingly, they may not be taken as established. See Certified Record Item 5, Motion to Strike Certificates, etc., and appended affidavit. The Texas Supreme Court has appellate jurisdiction only. See Texas Constitution, Article 5. The facts asserted at Opposition, p. 28 were not established in either the trial court or the Supreme Court of Texas. Hence they are not established here.

Moreover, assuming *arguendo* that there was no question as to the validity of the fines; there yet remains the question as to the jurisdiction and power of the State Court to jail petitioners.

FILE COPY

Ohio-Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 896.

CHARLES MORENO,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. _____.

CHARLES MORENO,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

I. JURISDICTION.

On November 6, 1955, the petitioner, Charles Moreno, commenced an action against his employer, The New York Central Railroad Co., under the Federal Employers' Liability Act, 45 U. S. C. A. Section 51 et seq. The theory of petitioner's suit was that his employer was negligent in failing to provide him with a safe place in which to work, as a proximate result of which Charles Moreno was the victim of an assault by a fellow employee. The case came to trial some four (4) years later at which time the Cuyahoga County Common Pleas Court directed a verdict for the defendant at the close of plaintiff's case. The verdict of the trial court was affirmed in the Cuyahoga County Court of Appeals without opinion and subsequently, on January 25, 1961, the Ohio Supreme Court overruled Charles Moreno's motion to certify.

Having failed in the Common Pleas Court, the Court of Appeals and the highest Court of Ohio, the Ohio Supreme Court, Charles Moreno now petitions this court for

a Writ of Certiorari under the provision of Title 28 U. S. C. A. 1254 which states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the United States Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the constitution, treaties or law of the United States, and the decision is in favor of validity.
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under the United States."

Petitioner says that the rulings of the Common Pleas Court, the Court of Appeals and the Ohio Supreme Court have deprived him of his rights under the Federal Employees' Liability Act, a statute of the United States, and petitions therefore for a Writ of Certiorari.

II. QUESTION PRESENTED FOR REVIEW.

(A) Did the petitioner establish a cause of action against his employer, The New York Central Railroad Co., under the F. E. L. A. on the grounds that said employer was guilty of negligence and violated the F. E. L. A. by failing to have any supervisory employees present at the job sites at any time on Nov. 26, 1954 to check into work of the co-employees or to check on or inspect the co-employee's condition on the day when petitioner was injured by an intoxicated co-employee, who had reported to work in the morning while under the influence of intoxicating liquor, and continued to drink thereafter, thereby breaching its duty to provide plaintiff with a safe place of employment.

III. STATUTES INVOLVED.

Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51 et seq., reads, in pertinent part, as follows:

"LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES.

Every common carrier by Railroad while engaging in commerce between any of the several states or territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none,

then to the next of kin defendant upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered entitled to the benefits of this chapter."

IV. STATEMENT OF THE CASE.

(A) Before Trial.

On November 26, 1954, defendant, New York Central Railroad Company, was in the process of dismantling and abandoning the Linndale yard in Cleveland, Ohio, which had been used as a switching and repair station.

On that date, and for many years prior thereto, plaintiff was employed by the defendant railroad company as a "sheet metal" worker in its bridge and building department. On that same date, a man by the name of Robert Nezbeth was employed by defendant as a "pipefitter" in the same department. Also employed in the bridge and building department was a man named Lenny Long, who, on November 26, 1954, was assigned to plaintiff as a helper and as driver of the truck transporting plaintiff from the Cleveland Union Terminal to the Linndale yards of the defendant railroad company.

Plaintiff would report daily to his foreman, one, Ray F. Kelly, at the company's offices in the Union Terminal,

in downtown, Cleveland, Ohio, and there receive instructions relative to the work for the day.

On the particular day in question, November 26, 1956, plaintiff reported as usual, and was instructed to take a truck, and with Lenny Long, his helper, as driver, go to the Linndale Yard several miles from downtown Cleveland to dismantle some lockers and other office equipment and deliver them to the Union Terminal. He was directed to make two round trips—one in the morning and one in the afternoon.

Upon his arrival at the Linndale Yard he discovered that Robert Nezbeth had been drinking, that his face showed the result of "*plenty* of alcohol." Plaintiff was not particularly concerned about Nezbeth's condition inasmuch as the two men were not working together although working in the same department. The record, of the Proceedings in the Cuyahoga County Common Pleas Court shows that at or about 10:00 A. M. on 11/26/54, Nezbeth in the condition described, came to the place where plaintiff and his helper were working and suggested that the three men leave the yard to get some "coffee." Plaintiff declined, but Long, plaintiff's helper, agreed to go. Both Nezbeth and Long took the truck which had brought plaintiff and his helper from the Union Terminal to the Linndale yard. Nezbeth and Long returned at about 1:00 P. M., with Nezbeth admittedly intoxicated.

The record also shows that Mr. Nezbeth is a man of satisfactory disposition when he is sober; but when "under the influence of liquor he is the most mean and most brutal man you could face." This was also Nezbeth's reputation among the men with whom he worked.

Upon his return to the Linndale Yard, Nezbeth was nasty and quarrelsome and began to direct foul language toward the plaintiff without provocation. Just at that

time a whistle blew three times from the roundhouse, indicating a telephone message from the foreman for someone. Nezbeth, being the "gang leader," should have answered the call, but when he failed to do so, plaintiff went to the roundhouse instead. Upon his arrival at the roundhouse, the clerk on duty there gave him a message for Nezbeth pertaining to some work that Nezbeth was to perform.

Plaintiff returned to the yard and handed the message to Nezbeth, whereup Nezbeth continued using the same foul language as when plaintiff had left him. Plaintiff began walking away from Nezbeth toward the truck which had been used to transport him from the Union Terminal to the Linndale Yard. Nezbeth followed him and suddenly without provocation struck plaintiff in the face, leaving him with a fractured jaw.

Plaintiff's evidence further showed that no supervisory personnel had been present at the Linndale Yard at any time during that morning; nor had anyone checked Nezbeth in to work that morning; that Nezbeth had a reputation for often reporting to work in an intoxicated state; and that he was mean and brutal when in such condition. The evidence further showed that Nezbeth reported to work on 11/26/54 under the influence of liquor, and continued to drink that morning.

The evidence further showed that defendant, New York Central Railroad Company, provided no supervisory personnel at the Linndale yard where Nezbeth reported for work that day, to check on the employees at any time before, at, or after reporting to work, or while on the job that morning.

The petitioner commenced suit against the New York Central Railroad in the Common Pleas Court of Cuyahoga

County on November 6, 1955. Mr. Moreno's petition charged the New York Central Railroad with the following acts of negligence (page 2, Para. 3):

> "Plaintiff states that defendant was negligent in not providing plaintiff with a reasonably safe place to work; that from the time of beginning of work to the time of the attack of plaintiff did any person of a supervisory capacity check on the group of employees with whom plaintiff was working; that had plaintiff's foreman or other supervisory person made such a check, Nezbeth's intoxication would have been discovered and Nezbeth would have been relieved of further work that day and injury to plaintiff thereby prevented."

On the 19th day of November, 1959, the case, captioned Charles Moreno vs. New York Central Railroad and being civil case No. 689,991, came to trial in the Common Pleas Court of Cuyahoga County, Ohio, before the Honorable Charles W. White, Judge thereof.

(B) Verdict in Trial Court.

At the close of plaintiff's evidence, the defendant made the following motion for directed verdict (Record pages 201, and 202):

> "Mr. Ryan: Your Honor, the defendant will now move for judgment at the end of plaintiff's case, on the basis that the plaintiff has not shown that Mr. Nezbeth, the actor in plaintiff's complaint, was acting within the scope of his employment, and at the same time in furtherance of the business for which he was employed.
>
> (Record p. 202) We wish to cite specifically the case of Young vs. The New York Central Railway Company, 88 Ohio Appellate 352, certiorari denied 339 U. S. 986.

This was a case decided by our Court of Appeals. Something I omitted, Mr. Dolan informs me that the plaintiff failed to show a cause of action under the Federal Employers' Liability Act.

The Court: Just a moment. Are you moving for judgment at the close of plaintiff's case, or not? Or are you demurring to the petition?

Mr. Ryan: We are moving for a judgment, your Honor.

The Court: All right."

The trial court directed a verdict in favor of the defendant and granted judgment to the defendant on the authority of *Young vs. New York Central*, 88 O. App. 352 (R. pp. 257-260).

Plaintiff duly excepted thereto and duly filed a motion for a new trial on the following grounds:

1. Error of the Court in granting defendant's motion for judgment at the close of plaintiff's case.

2. Error of the court in admitting or rejecting evidence over objections of counsel to plaintiff's prejudice.

3. Other errors of law appearing in the record.

The motion was overruled and plaintiff appealed to the Cuyahoga County Court of Appeals.

(C) Verdict in the Court of Appeals.

Plaintiff's assignments of error to the Court of Appeals included the following:

(A) Error in granting defendant's motion for judgment at the close of plaintiff's case.

(B) Error in failing to grant plaintiff's motion for a new trial.

The Court of Appeals of Cuyahoga County, Ohio affirmed the judgment of the trial court without opinion.

the journal entry reading as follows (Exhibit A—Appendix p. 21):

> "This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed and it is ordered that the appellee recover of appellant his costs herein taxed.
>
> The Court finds there was reasonable grounds for this appeal.
>
> It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution. Plaintiff excepts."

Plaintiff then appealed to the Supreme Court of Ohio, assigning the following errors:

> (A) Error in granting defendant's motion for judgment at the close of plaintiff's case.
>
> (B) Error in failing to grant plaintiff's motion for a new trial.
>
> (C) Error by the Court of Appeals in affirming the action of the trial court.

(D) Verdict in the Supreme Court of Ohio.

On January 25, 1961, the Ohio Supreme Court overruled Mr. Moreno's motion for an order directing the Court of Appeals of Cuyahoga County to certify its record. The Court without opinion, made the following ruling (Exhibit B—Ruling of Ohio Supreme Court, p. 21, *infra*):

> "It is ordered by the court that this motion be and the same hereby is, overruled."

V. REASONS FOR GRANTING THE WRIT.

The basic issue involved herein is whether or not defendant-employer provided plaintiff-employee with a safe place in which to work. The record shows that defendant failed to have any supervisory personnel present at any time during the day on which plaintiff was attacked. It is plaintiff's contention that defendant thereby failed to provide plaintiff with a safe place in which to work.

The trial court's ruling was based on the authority of *Young vs. New York Central Railroad,* 88 Ohio App. 352, which case held that an employer was not liable for an unprovoked attack by one employee upon another employee, not involving furtherance of the employer's business, and wherein motion to certify was not granted either by the Ohio Supreme Court or by the United States Supreme Court.

In the present case, however, we are not dealing with that simple a problem. Plaintiff's contention is not merely that he was attacked by another employee, but that his employer failed to provide him with a safe place in which to work, and that the employer's negligence in that respect was the cause of his injury; that, by proper supervision or inspection, defendant could have avoided the consequences that gave rise to plaintiff's injury; that the failure to supervise and inspect, after a reasonable time in which to have notice of an employee's intoxicated condition, was negligence for which plaintiff is entitled to recover for injuries sustained. Hence, the issue raised in the *Young* case above, as to whether the injury was sustained while the *attacker* was furthering his employers' business, is immaterial in this case.

In order to crystallize the issue in this case and to point up the fact that the trial court granted defendants motion for a directed verdict based upon the erroneous

supposition that the case of *Young vs. New York Central Railroad Co.*, 88 O. A. 352, certiorari denied 339 U. S. 986, 94 L. Ed. 1388 (1949) controlled this Moreno case, and that the trial court entirely overlooked the distinction between this Moreno case and the *Young* case, the plaintiff-appellant is submitting in toto the ruling of the trial court as set forth on p. 257 of the trial court record, to-wit:

> (257) "The Court: Gentlemen of counsel, in the relatively brief time that was allotted to me for consideration of defendant's motion, which I take in its entirety is a motion to arrest the case and the evidence from the jury and enter judgment for the defendant—is that correct, Mr. Ryan?
>
> Mr. Ryan: Yes, your Honor.
>
> The Court: I have given the subject painstaking consideration. I have read and reread the Young case, from the Court of Appeals of Cuyahoga County, and the Tatham case from Illinois, which was not cited but which is reported in ALR, Second, Volume 33, at page 1287, and it is found in the annotations, in which all of the leading cases are reviewed.
>
> I have also examined a very informative article in 17 Ohio State Law Journal on what is a safe place to work. There, again, a number of cases are analyzed and referred to.
>
> Counsel for the plaintiff in answer to my question yesterday conceded that this Court is bound by the decision of the Court of Appeals of Cuyahoga County, unless the Court should be able to distinguish that case.
>
> The Court has made strenuous efforts to find some basis for distinguishing the Young case from the instant case, (258) and I am rather sad to acknowledge that the Court has failed in that effort.
>
> This plaintiff suffered a grievous injury. The Court has been impressed by this total lack of fear, and his honesty as a witness, and it has been impressed, too, by his intelligence.

The Court believes that Mr. Moreno represents an ideal type of workman, conscientious, does his work, loyal to his employer, faithful to any task that is assigned to him.

Of course, you gentlemen realize that this motion has to be decided on the basis of the law as the Court finds the law to be or understands it to be, and my sympathy for Mr. Moreno cannot be an influence in that connection.

The plaintiff made clear to the Court yesterday in oral argument that he places no reliance upon the theory that the defendant should be held answerable for Mr. Moreno's injury on the principles obtaining under the rule of respondeat superior.

If that were the theory of the plaintiff, it would be appropriate for the Court to consider whether Mr. Nezbeth's acts were within the scope of this employment and in furtherance of the employer's business.

(259) From the statements of counsel for the plaintiff it is crystal clear that this is an action based upon an alleged direct negligence of the employer.

The employer is alleged to have been negligent in not providing a foreman at Linndale Yard on the morning of November 26, 1954, who if present on the scene might have discovered Mr. Nezbeth's condition before he struck Mr. Moreno, and might have relieved him from duty.

There is no evidence that the defendant, through Mr. Kelley or any other agent, had any knowledge that Mr. Nezbeth had been drinking before he came to work, or that he went off the job and indulged in more drinking.

There is no evidence that the defendant through any of its agents had any knowledge that Mr. Nezbeth was accustomed to appear for and be at work under the influence of intoxicating liquor.

The evidence is that among his fellow-workers he had the reputation of sometimes—I think Mr.

Moreno's exact words were "from time to time"—Nezbeth would be on the job under the influence of liquor, and at such times—otherwise a fine, congenial gentleman—he would be a rough, vicious person.

(260) Mr. Moreno did not say that he ever communicated that intelligence, such as he had, and there is no evidence that Mr. Moreno knew of the separate incidents which contributed to that reputation. He just knew that that was the reputation.

The Court is fully aware of the fact that the reviewing courts frown upon directed verdicts in FELA cases; to say the least, they do not encourage them.

But this Court perceives that it is its duty to rule on this motion in accordance with its understanding of the law, without fear what the reviewing courts may ultimately do in this matter, and I hope it goes to the reviewing courts because I would like to see the decision I am about to give tested.

In the opinion of the Court the evidence fails to support the contention of the plaintiff that the New York Central Railroad was negligent in any respect.

On the authority of Young versus New York Central Railroad, 88 Ohio Appellate, page 352, the motion is granted and exception is saved to the plaintiff."

The plaintiff maintains that the defendant-appellee employer was guilty of negligence and violated the Federal Employers' Liability Act (FELA) by failing to have any supervisory employees check in the co-employees or to check on the co-employees condition on the day when plaintiff-appellant was injured by an intoxicated co-employee. The failure to have any supervisory employee on the job site at any time that day constituted a breach of the duty to provide plaintiff with a safe place of employment. Such supervisory employee would have and should have prevented an intoxicated employee from working on

the premises with plaintiff and would have and should have sent said intoxicated employee away from the situs of work. Failure to inspect, or supervise, or have charge of the premises also was negligence and a breach of defendant's duty owed to plaintiff.

Moreno's action was brought under the Federal Employers' Liability Act, and since this Act does not define negligence, the question of whether the defendant provided a safe place in which to work, i.e. whether defendant's failure to act amounted to negligence, must be determined according to the common law. See 56 C. J. S. Master and Servant, § 173.

While a master is not an insurer of his servant's safety, the duty of a master is to exercise *due care* to protect his servant from injury. In 56 C. J. S. Master and Servant § 183, the following statements appear:

> "The degree of care exacted is that of ordinary or reasonable care; generally, no higher degree of care is required, and a master may be liable though not guilty of gross negligence. In the proper performance of his duties as master, he is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and he agrees by implication of law not to subject a servant employed by him to extraordinary or unusual perils. He must exercise reasonable care to eliminate those elements of danger to the servant's life and limb which are not the usual and natural incidents of the service when the master has exercised reasonable care, and *he must not expose his employees to perils or hazards against which they may be guarded by proper diligence on his part.* * * *
>
> "Under the Federal Employers' Liability Act an employer's liability is to be determined under the general rule, which defines negligence as the lack of due care under the circumstances, or *the failure to do*

what a reasonable and prudent man ordinarily would have done under the circumstances of the situation, or doing what such a person, under the existing circumstances would not have done; and *a master is liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.*" (Emphasis added.)

The above statements based on numerous cases indicate that as a matter of law the defendant-employer was under a duty to take care of the plaintiff-employee by providing him with a safe place in which to work. Whether defendant fulfilled that duty was a question of fact to be decided by the jury after *all* of the testimony was concluded. The trial court was in error in granting defendant's motion for judgment at the close of the plaintiff's case.

Plaintiff will agree that a master is not compelled to foresee and guard against an accident which a reasonable and prudent man would not expect to happen; however, where the facts are such that the consequences attributable to the negligence of a master are within the field of reasonable anticipation, he is liable for an injury received by a servant in consequence thereof. Thus. it was defendant's duty to supervise and know of the condition of all of its employees, especially at the time they report in to work, and throughout the day, as well, especially where such employees have an opportunity to sneak off and "take a nip."

As long ago as 1854, in the case of *Cleveland, Columbus & Cincinnati Railway vs. Keary,* 3 Ohio St. 201, the Supreme Court of Ohio recognized the principle that it is the duty of an employer to provide reasonably safe conditions in which his employees must do the work assigned

to them, and that an employer is under a duty to superintend and control the forces which he employs.

The defendant-employer New York Central Railroad Co., clearly failed to perform its duty, as indicated in the facts of this Moreno case. However, reasonable men may differ in a determination of this fact and our plaintiff was, to say the least, entitled to such a determination. Where, at the close of plaintiff's case, defendant moves for a directed verdict in his favor because of lack of proof of a material fact, the trial court must overrule the motion and submit the case to the jury if there is any evidence tending to establish the existence of such fact, no matter how much evidence there is to the contrary. *Lloyd v. General Tire & Rubber Co.*, 24 Ohio App. 62, 156 N. E. 531. In this Moreno case there was *no* evidence to the contrary, and all of the evidence, including the testimony of defendant's employees and supervisory employees, was that no one had checked in Nezbeth, or checked on Nezbeth that morning and that he had been drinking and that he struck plaintiff.

The plaintiff-appellant has argued above that the defendant-employer was negligent in not providing plaintiff with a safe place of employment as required by the Federal Employers' Liability Act.

Plaintiff now wishes to cite additional cases in support of his view that the defendant, New York Central Railroad Co., was negligent herein, and submits the following additional authorities:

(a) *Rogers vs. Missouri Pacific Railroad*, 352 U. S. 500, 506 (1957) the Court has properly emphasized to inferior courts that FELA-Jones Act cases differ from ordinary negligence cases, because the Act makes the employer liable for any injury caused "in whole or in part" by its negligence. And "in part" means "even the slightest part." *Rogers v. Missouri Pacific R. R.*, 352 U. S. 500, 506 (1957).

(b) *Lillie vs. Thompson*, 322 U. S. 459 (1947).

Facts: 22 year old female telegraph operator worked alone in a small shanty in an isolated part of railroad yard and was brutally and criminally assaulted.

Court: held carrier had reason to know that yards were frequented by dangerous characters but had failed to take protective measures for plaintiff's safety and reversed a judgment for defendant.

(c) *Tatham vs. Wabash Railroad*, 412 Ill. 568, 33 A. L. R. 2nd 1287 (1952).

Facts: Plaintiff sustained injuries as result of an assault by a fellow employee and charged (2nd ground) employer with direct negligence in knowingly employing a dangerous man to work with plaintiff, thereby creating the hazard which resulted in plaintiff's injuries.

Court: held defendant carrier is under a duty to protect its employees from foreseeable harm from fellow employees.

(d) *Kelly vs. New York, New Haven, and Hartford Railroad*, 138 F. Supp. 82 (1956).

Facts: Plaintiff stabbed by co-employee over a personal matter.

Court: held that evidence was sufficient to show that railroad had prior notice of co-employee's belligerent tendencies and should have discharged co-employee.

There have been also a series of cases under the Federal "Jones" Act pertaining to seamen which have similarly allowed the assaulted employee to sue his employer.

(e) *Wanca vs. Penn Industries, Inc.*, 260 F. 2d 350 (2d Cir. 1958) (Where defendant's foreman had notice that an employee had been quarreling with another of defendant's workmen for half a day, his

failure to fire such employee created a risk that a foreseeable fight would result involving a dangerous instrument, such as a gun, thereby injuring innocent bystanders, such as plaintiff. Judgment for plaintiff *aff'd*).

(f) *Martin vs. C. A. Productions Co.*, 189 N. Y. S. 2d 528 (App. Div. 1959) claimant, a dancer in a musical play, was invited by his employer to attend a closing party held on stage for the cast and others after the final curtain; he was unjustifiably assaulted and injured by a drunken guest invited by the employer whose condition could be found to have been known by the employer; held, aff'ming award of benefits: (1) the fact that claimant received his final wages before the party is not controlling—he was expected to attend the party and to do so was good business; (2) the Bd. was justified in finding that the party, under the employer's aegis on the same stage, was a continuance of the employment.

(g) *Perez vs. Fred Harvey, Inc.*, 54 New Mexico 339, Syll. 5. If a jury should find that when claimant was shot by fellow employee, and the fellow employee was so highly intoxicated that he did not know what he was doing, then his acts would fall in the category of those of an insane person and injuries would be injuries "arising out of employment" within meaning of the Compensation Act.

(h) 99 C. J. S. 765 Workmen's Compensation § 226.

"Intoxicated employee.

An employee is entitled to reasonable care by the employer to protect him from an assault by an intoxicated employee."

Citing 207 N. C. 344, *Wilson v. Boyd and Gaforth.*

(i) *Atlantic Coast Line R.R. vs. Southwell*, 275 U. S. 64 (1927). Assuming that a railroad company

could be held liable under the FELA for the wilful killing of one of its employees by another, if it resulted from the negligent failure of their superior officer to foresee the danger and prevent it, the charge of such negligence in this case is not borne out by the evidence in this case.

(j) *Anderson vs. Security Building Co.*, 100 Conn. 373, 123 A. 843, 40 A. L. R. 1110. The Court said, "whenever an employer puts his employees at work with fellow servants the conditions actually existing, apart from the possibility of wilful assaults by a fellow servant independent of the employment, which result in injury to a fellow employee, are a basis for compensation under the implied contract of that Act. So in this case, although the employer may not have had knowledge actual or constructive, that Markus, a fellow servant of the plaintiff, was insane and liable to run amuck, yet such liability of Markus to run amuck was in fact a condition under which the plaintiff was employed on the night in question, and if such condition of Markus caused an injury to plaintiff as it did, then the injury to the plaintiff arose out of his employment as truly as if it had arisen from the negligence of Markus in doing his work.

VI. CONCLUSION.

Plaintiff contends that the question raised in this appeal is new and novel, and has never been ruled upon by the Ohio Courts or the Federal Courts; that the question is of great public interest and that this plaintiff has been deprived of his right under the Federal Employers' Liability Act.

WHEREFORE, plaintiff-appellant prays that the Court issue a writ of certiorari ordering the Supreme Court of Ohio and/or the inferior courts thereof to certify the rec-

ord to this Supreme Court of the United States of America for further hearing by it and that, upon final hearing, the rulings of the Common Pleas Court of Cuyahoga County, Ohio, and of the Court of Appeals of Cuyahoga County, Ohio, and of the Supreme Court of Ohio be reversed and the case remanded for a new trial.

Respectfully submitted,

ARTHUR KRAUSE,

Attorney for Petitioner.

AUSTIN T. KLEIN,
GERALD E. FUERST,

Of Counsel.

APPENDIX.

EXHIBIT A. JOURNAL ENTRY OF THE COURT OF APPEALS.

Dated: October 11, 1960.

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court of Cuyahoga County and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed and it is ordered that appellee recover of appellant his costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Plaintiff excepts.

EXHIBIT B. ORDER OF THE SUPREME COURT OF OHIO.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

FILE
Office - Supreme Court, U.S.
FILED
MAY
JAMES R.

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 896.

CHARLES MORENO,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE BAKER-NICKENS LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5847

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent prays that this court deny the Petition for Writ of Certiorari presented by Petitioner to review the judgment of the Court of Appeals of the Eighth Judicial District of Ohio, which judgment affirmed the judgment of the Court of Common Pleas of Cuyahoga County, Ohio. The Supreme Court of Ohio overruled the Petitioner's Motion to certify the record in this cause.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. A. 1257(3).

ISSUE.

An employee of a Railroad Company intentionally assaulted and injured by a fellow employee has not sustained his burden of proof against his employer under the F. E. L. A. unless he offers evidence that of the time of the assault and injury, the assaulting employee was acting within the scope of his employment and in the furtherance of the work of the employer.

STATUTES INVOLVED.

The trial and appeal below involved the Federal Employers Liability Act, 45 U. S. C. A. 51 et seq.

STATEMENT.

This action arises from an intentional assault and battery committed by a pipefitter upon a sheetmetal worker, both of whom were employed by the New York Central Railroad Company.

Shortly after Petitioner reported for work Nov. 26, 1954, at The Cleveland Union Terminal, he, a sheetmetal worker and his helper were assigned to go to the Linndale shops some several miles away with a truck and to bring office furniture from the Linndale shops to the C. U. T. Upon arriving at Linndale about 8:20 a. m. the Petitioner saw Nezbeth, a pipefitter, about the premises and observed that Nezbeth appeared as if he had been drinking the day before which was Thanksgiving Day. (R. 71-84.)

Nezbeth approached Moreno and asked to use the truck to move certain materials. Moreno consented and

with Nezbeth, Moreno moved the materials with the truck. Nezbeth then returned the truck to Moreno, all without incident. Moreno and his helper resumed their work. (R. 84-85.)

About 10:00 A. M., the pipefitter, Nezbeth, who was engaged in other work about the premises asked Moreno to go with him for coffee. (R. 72.) Moreno declined the invitation, but Moreno's helper, Mr. Long, accepted the invitation of Nezbeth to go for coffee. (R. 72.)

Nezbeth left his work, and the premises of the Railroad Company. Nezbeth drove some distance in a private automobile to a restaurant which served liquor. While in this establishment, Nezbeth consumed 3 or 4 "Boilermakers" (a shot of whiskey and a glass of beer) and a hamburger for lunch. Nezbeth and Long returned to the Railroad shops about 1:00 P. M. (R. 74.)

During the absence of Nezbeth from his work, Moreno continued with his work, ate lunch and awaited the return of the helper who was assigned to drive the truck. (R. 166.)

Prior to the altercation which developed within 5 minutes of Nezbeth return, (R. 157) Moreno and Nezbeth had known each other for years and had a fine relationship. This was renewed subsequent to the altercation. (R. 126.)

Mr. Long and Mr. Nezbeth returned to the Linndale Yard shortly before 1:00 P. M. Mr. Nezbeth appeared to have been drinking. Mr. Moreno and Mr. Nezbeth engaged in a short conversation, at which time, a whistle blew three times. The whistle apparently meant that there was a phone call from the supervisor of both Mr. Nezbeth and Mr. Moreno, Petitioner herein.

Mr. Moreno walked a distance of about 100 yards to answer the telephone, at which time he received from

another Employee a note regarding certain work to be done in the Linndale Yard. Mr. Moreno returned to the place where he had left Mr. Nezbeth, and handed Mr. Nezbeth the note. Mr. Nezbeth apparently thought, at that time, that Mr. Moreno had reported Nezbeth's drinking to their supervisor.

As Mr. Moreno left Mr. Nezbeth after handing Nezbeth the note, Nezbeth followed him toward the truck and without warning, struck Mr. Moreno in the face, knocking him to the ground.

The testimony regarding this occurrence is as follows (R. 91):

"Q. Now, will you tell this Court and jury what happened when they came back?

A. When he came back, the first thing—and this is important testimony in this case—when he came back he faced me there, and he say in a staggering condition what you have to say in regard of that.

The Court: Why you have to say what?

A. What I have to say in regard of that, in his condition that he appeared. I told him there for a moment that he staggering and been drunk, and I say I ain't having nothing to say. I didn't come here to say anything in that.

Then he started and used the most dirty language against me.

I say, 'What I do now, Bob, that you start like that?'

Well, it start at that moment three whistles from the storeroom in the roundhouse blow, one two, three, and these three whistles mean that Mr. Kelley, my foreman, want somebody to come and answer that telephone, he want something. Or either the men in the Linndale shops want to see some of the mechanics in regard of the work.

So when I see that Mr. Nezbeth don't do no move to go and answer this call, I say I believe call,

Mr. Kelly inquire why I don't be back in the Terminal about this time with the first load.

I went and answered the call, that was about far from the shop to the place where that whistle was blowing, about 500 yards, or approximately that.

I went there and the man in the storeroom, he say, 'Charlie, will you please give that to Bob, orders for work to be performed?'

Q. Was this a note that was on the desk?

A. Note that he handed me there.

Q. This was a piece of paper that he handed to you?

A. Piece of paper. I say, all right, was Kelley calling, no. He say they calling here in the storeroom, in the yard, and they want certain things to be done by our forces. That mean the maintenance forces in the Linndale yard, not me.

So I came back, I hand the note to Mr. Nezbeth, and he said, orders there for you to perform certain work there.

He is still keeping insisting there and using the same language, and I say, well, I ain't got nothing to do with that there.

So I thought of it that he was drinking—

Q. I didn't understand you.

A. I told him, the exact swearing and cussing there was in regard I see him drunk, but no in regard of the driving of the truck.

I started from the shop—at that time Mr. Long, Lenny Long, disappeared. Where the truck was I can't tell you how far it was from the premises or where it was parked there.

Our building have a ramp to come there on a ramp from the shop into the ground, and Nezbeth was back of me swearing and using bad language.

Q. Were you still inside the shop at this time or was this outside the shop?

A. He was far from me from inside the shop going to the truck there.

Q. I see.

A. When we get up to the bottom of the ramp, suddenly without any warning, without taking nothing off there, he turn around and gave me such a wallop there, that the results was a broken jaw. But I don't wait for that. Automatically, I run on the ground. I get up. My bottle was thrown out, the things were out of the box, that I have my box in the hand, thrown out on the ground.

I pick it up and I say, 'Bob, what I do to you?' and still I disregard him completely there, pick my things and walked to the truck about from here to then end of this room, and the truck was Mr. Long at the wheel already, ready to go there.

That's the first time I seen the truck since 10 o'clock.

Q. Now, when he struck you, you were walking away from him toward the truck, is that it?

A. Yes.

Q. And he followed you?

A. Yes, and he was back of me and I was facing you and he was in back of me, and suddenly he just grabbed me—

Q. When you say suddenly you are saying suddenly he did this?

A. Suddenly, suddenly. He turned me around and without any warning and without myself having anything there, that if I seen he was going to swing at me perhaps face to face, I will raise my hand and break the blow.

But, of course, I didn't wait there like that. I get the whole impact of his blow right there on my jaw there, and throw on the ground.

Q. He knocked you down, is that it?

A. Knocked me down."

The record shows that Mr. Nezbeth, the assaulter, had no authority over either the Petitioner or the Peti-

tioner's helper. The record is clear that Mr. Nezbeth, the assaulter, had no authority over the truck being used by the Petitioner.

The Petitioner testified (R. 62):

"But the truck most of the time was assigned there to me there to carry different things there from a point to a point, and always Mr. Long in charge of driving under my supervision. I be in charge of the truck and he was in charge of the driving."

And again the Petitioner testified (R. 129):

"Q. Now, you say that on November 26, 1954, when you were in that truck you were with your helper, whose name was Lenny Long?

A. Yes.

Q. And that you supervised Mr. Long?

A. Not supervised Mr. Long, because I don't belong to a supervision in any capacity.

Q. I believe I am quoting from your testimony.

A. No.

Q. I think I wrote it down when you said it. You said that he was your helper and you supervised him in that truck, you were in charge of that truck, did you say that?

A. I might have used the word supervisor. I was in charge of the truck, not supervision of the truck."

The Petitioner further testified (R. 156):

"Q. On November 26, 1954, did Mr. Nezbeth have any authority over you?

A. None whatsoever, that I know.

Q. He could not direct you to do any particular work?

A. No.

Q. Did Mr. Nezbeth on November 26, 1954, have any authority over your helper, Mr. Long?

A. None; none, whatever.

Q. On November 26, 1954, did Mr. Nezbeth con-

trol the activities or the movement of the truck you were using?

A. No."

The conversation which took place between Mr. Nezbeth and the Petitioner upon Nezbeth's return to the Linndale Yard, took place within 5 minutes after he returned.

There is no evidence in the record whatsoever, that previous to the altercation between Mr. Nezbeth and the Petitioner, The New York Central Railroad Company had any previous knowledge of a propensity on the part of Mr. Nezbeth to become belligerant or to drink while at work.

The single question presented to this Court, is whether, under the Federal Employers' Liability Act, the Petitioner has sustained his burden of proof against his employer for injuries sustained from an assault made upon him by another employee, unless, at the time of the assault, the assaulter was acting in the course of the discharge of his duties and in furtherance of the work of his employer's business.

There is not a scintilla of evidence in the record that the assailant, Nezbeth, was within the scope of his employment and, in addition, acting in the furtherance of the work of his employer's business. The record leaves no conclusion but that the assaulter was on a venture of his own and, in a burst of temper, he acted in such a manner so as to actually impede and hinder the progress of his employer's business.

The substantive questions of law are controlled by Federal Law and particularly by the Federal Decisions under the Federal Employers' Liability Act.

There can be no question that a recovery of an employee against a railroad company under the Federal Employers' Liability Act must rest on negligence. With this understanding of the scope of the Federal Employers' Lia-

bility Act, the Respondent, The New York Central Railroad Company, now proceeds to a discussion of the authorities which it claims clearly controls the judgment in this case.

GROUNDS FOR NOT GRANTING THE WRIT OF CERTIORARI.

It is respectfully submitted that it would be improvident to grant a writ of certiorari in this case since: (a) there is no important question of federal law involved herein, and (b) there are no public issues presented.

For many years the decisions of this Court and other courts have established the law in this area of the F. E. L. A. It may be summarized as follows:

An employee of a railroad company has no cause of action against his employer under the Federal Employers' Liability Act, 45 U. S. C. A. Section 51 et seq., for injuries sustained from an assault made upon an employee by another employee, unless a the time of the assault, the assaulter was acting in the course of the discharge of his duties, and in the furtherance of the work of his employer.

The trial court so held, and the Court of Appeals for the 8th Judicial District of Ohio also held accordingly. Upon presentation to the Supreme Court of Ohio, the petitioner was unable to establish an issue of great and general public interest.

The decisions of this Court, the several Circuit Courts and the District Courts, together with the decisions of the several State Courts, uniformly hold that under the Federal Employers' Liability Act unprovoked intentional torts committed by one employee upon another are not actionable without proof that the act was committed within the scope of the employment and in the furtherance of the carrier's business. The petitioner here has not attempted.

to meet this test, and recognized in the trial court his failure to prove either of the two essential elements; namely that the act was committed within the scope of the employment and that the act was committed in the furtherance of the master's business. Whereupon, the trial court arrested the case and entered judgment for the Respondent at the close of Petitioner's case.

The trial court determined that it was bound by *stare decisis* and followed *Young v. NYC R. R. Co.*, 88 Ohio App. 352 (1949), certiorari denied 339 U. S. 986; 94 L. ed. 1388 (1950) and the cases cited therein.

In *Young v. New York Central Railroad Company*, 88 Ohio Appellate, 352, Certiorari denied, 339 U. S. 986, 94 L. Ed. 1388 (1949), the Court of Appeals for Cuyahoga County affirmed the directed verdict and judgment of the Court of Common Pleas.

Young, a railroad signalman, brought his action under the Federal Employers' Liability Act against his employer for damages for injuries sustained as a result of an unprovoked attack made by a fellow worker. The complaint claimed that the defendant was negligent in retaining in its employ, a dangerous and vicious man, with knowledge of these propensities and characteristics and *failing to provide the plaintiff with a safe place to work.* (Emphasis ours.)

The opinion graphically describes the incident complained of and the prior history of altercations in which the assaulting employee was involved. The assaulting employee had made seven or eight serious, malicious and unprovoked attacks upon fellow employees *and these prior attacks were known to the dispatcher and superintendent.* And, it was assumed by the court, that notice of such incidents created knowledge on the part of the employer.

Young, a man of 50, having 31-years service, was a

tower operator at the C. & P. crossing in Cleveland, Ohio, working from 11:00 P. M. until 7:00 A. M. He reported to his shanty, near the crossing. He relieved Johnson, the assaulter, who was the lever man on the prior shift to Young's.

Prior to the night of the assault, Young only casually knew Johnson. They had had no physical encounters, words or trouble during the year, except one instance, in which Young was 45 minutes late and another instance when he was about one minute late.

On the night of the assault, Young was four minutes late reporting for work. Young had paid Johnson sixty cents to compensate him for overtime on the night Young was 45 minutes late, and otherwise had had no trouble and got along well.

On the night of the assault, Young had a flat tire on his way to work, and arrived about four minutes after 11 P. M. He had apologized to Johnson for his lateness, and explained that he had had trouble with his automobile.

He proceeded to the shanty with Johnson following him. As Young took off his jacket, Johnson shouted "I warned you not to come late * * * hurry up now, get to work." Johnson reached for plaintiff's jacket and appeared to be attempting to pull it off. What appeared to be mere jerking of the plaintiff's jacket, was repeated stab wounds in his chest and abdomen. In the struggle which ensued, plaintiff was severely cut and stabbed in the chest, abdomen and legs. Young was able to save his life by striking Johnson several blows with a stove poker, thereafter escaping from the shanty and calling a nearby Pennsylvania Railroad crew for help. Plaintiff was hospitalized under oxygen and underwent two operations. He remained in the hospital for one month and was beridden at home another month.

At the close of all the evidence, the trial court granted the defendant railroad's motion for a directed verdict and rendered a judgment thereon, whereupon a motion for a new trial having been overruled, and appeal on questions of law was perfected to the Court of Appeals for Cuyahoga County.

In affirming the judgment of the Common Pleas Court, Judge Hurd said at page 357;

> *"Cases involving circumstances similar to those of the instant case have heretofore been considered and decided by the Federal Courts and the interpretations placed upon the Federal Employers' Liability Act by such decisions must be followed by this court in the instant case so far as they are applicable."*

The Court of Appeals in the opinion in *Young v. NYC R. R. Co., supra*, discussed the "safe place to work" concept advanced on the plaintiff there and again presented in the case at bar. This concept was rejected as not applicable upon the decisions of this Court.

The particular hazards, the dangers inherent in the peculiar situation and the foreseeable risk of harm readily distinguish the *Young* case, *supra*, and the case at bar from *Lillie v. Thompson, Trustee*, 332 U. S. 549, 92 L. ed. 73, 68 Sup Ct. 140 (1947).

The Court considered the opinions of this Court in *Davis v. Green*, 260 U. S. 349, 67 L. ed. 299; 43 S. Ct. 123 (1922); *St. L. S. F. Ry. Co. v. Mills, Admx.*, 271 U. S. 344, 70 L. ed. 979, 46 S. Ct. 520 (1926); *Atlantic & Charlotte Airline Rd. Co. v. Green*, 279 U. S. 821, 73 L. ed. 976, 49 S. Ct. 350. The Court further considered *In re Southern Pacific Co.*, 30 F. (2d) 723 (1928), affirmed by the Court of Appeals 2nd Circuit 30 F. (2d) 725 (1929); *Lykes Bros. Steamship Co., Inc. v. Grubaugh*, 128 F. (2d) 387, CCA 5th; *Brailas v. Shepard Steamship Co.*, 152 F. (2d) 849.

CCA 2nd (1945); *The George Vickers, Cable v. U. S. A.*, 77 F. Supp. 515 (1947), modified on other grounds 169 F. (2d) 90 (1948); *Sheaf v. Minneapolis, St. P. & S. S. M. R. Co.*, 162 F. (2d) 110, CCA 8th (1947); *Smith v. Lehigh Valley Ry. Co.* 174 F. (2d) 592 CCA 2nd (1949). *The Smith* case, *supra*, was heard before Augustus N. Hand, Chase, and Clark, Circuit Judges. The Circuit Court held that the employee (appellant) who sued under the Federal Employers' Liability Act to recover for the intentional tort of assault and battery occasioned by a fellow employee, failed to sustain his burden of proof. Plaintiff there was carrying mail to sleeping cars and was on a platform built between a sleeping car and an unused dining car which was the last car next to another dining car then in use. The cook in charge of the dining car was the superior of the injured man Smith. The cook pushed or shoved another man, a laborer employed by the railroad, out of the unused dining car on to the platform where Smith was standing. The laborer resisted the cook and in the melee the cook suddenly pushed Smith off the platform and engaged in a fist fight with the laborer. Smith was injured when he fell to the ground after being pushed by the cook. Trial Court had submitted the issues to a jury and set aside a general verdict by granting a motion for judgment n.o.v. This was reviewed by the Circuit Court which followed the doctrines enunciated above stating, "The plaintiff had the burden of showing that the cook's negligence occurred in the course of his employment." (at 594.) Having failed to substantiate this burden, the judgment could not stand.

In the case at bar, the petitioner recognizes that he failed to sustain this burden.

The Supreme Court of Montana in an F. E. L. A. case followed the doctrines announced by this Court, the sev-

eral Circuit Courts, District Courts and State Courts, and held in *Amann v. Northern Pacific Railway Co.*, 272 P. (2d) 753 (1955), re-hearing denied 1956, that no cause of action under the Federal Employers' Liability Act is stated for the intentional tort of assault and battery by one employee upon another unless the pleadings show that the assaulting employee by engaging in the altercation was carrying out his assigned duties or that he was engaged in the performance of a task that he was employed to perform. In the *Amann* case, Amann, a foreman, was discharged when the assaulting employee continued his employment. The opinion of Chief Justice Adair gives careful attention to each of the many cases comprising the federal body of law relating to assault and battery by one employee of a railroad upon another under the Federal Employers' Liability Act. The Court held that under the Federal Employers' Liability Act the decisions uniformly require that the plaintiff show that the assaulter was acting in the scope of his employment and in the furtherance of his master's business at the time, place and occasion which precipitated the encounter in which the plaintiff was injured.

In *Ochsrider v. Reading Co.*, 172 F. Supp. 830 (1959), a welder in a railroad car shop was approached by a fellow employee who complained that plaintiff's work was progressing slowly, whereupon plaintiff attempted to placate the fellow employee. The plaintiff was assaulted and described the assault as follows: "* * * he came upright and started in swinging, clubbed me all over the face and teeth and jaw, I don't know how many times he hit me, and my glasses fell to the floor * * *." The District Court for the Eastern District of Pennsylvania followed the body of law as enunciated by this Court and others relating to intentional torts under the Federal Employers' Liability

Act and found "as the statute has been construed, 'negligence' may embrace an assault and battery, and the employer must respond if it was committed by an employee in the scope of his employment with the purpose of furthering the employers' business." The Court held that the evidence established that the assaulting employee did a wilful act wholly outside the scope of his employment intended only to further his own interests. Therefore the defendant railroad was not liable.

CONCLUSION.

The comment of Judge Hurd in *Young v. N. Y. C. R. R. Co.*, 88 Ohio App. 352 (1948), is appropriate to the case now before this Court, particularly so since the *Young* case was the precedent followed by the trial judge in the case at bar. Judge Hurd states "* * * Cases involving circumstances similar to those of the instant case have heretofore been considered and decided by the Federal Courts and the interpretation placed upon the Federal Employers' Liability Act by such decisions must be followed * * *." We submit the Trial Court herein, the Court of Appeals of the 8th Judicial District of Ohio and the Supreme Court of Ohio have without dissent agreed that the law as developed by this Court and other Federal Courts relating to assault and battery under the Federal Employers' Liability Act dictates the results arrived at by the Trial Judge herein.

The theory of the Petitioner regarding a safe place to work is neither an original nor a new concept in the law of intentional tort under the F. E. L. A., as the safe place to work doctrine was necessarily involved in each case cited by the respondent.

We respectfully submit that it would be improvident to grant a writ of certiorari in the case at bar.

Respectfully submitted,

JOHN F. DOLAN,

Attorney for Respondent.

APPENDIX A.

RULING OF THE COURT OF COMMON PLEAS.

The Court: Gentlemen of counsel, in the relatively brief time that was allotted to me for consideration of defendant's motion, which I take in its entirety is a motion to arrest the case and the evidence from the jury and enter judgment for the defendant—is that correct, Mr. Ryan?

Mr. Ryan: Yes, your Honor.

The Court: I have given the subject paintaking consideration. I have read and reread the *Young* case, from the Court of Appeals of Cuyahoga County, and the *Tatham* cases from Illinois, which was not cited but which is reported in ALR, Second, Volume 33, at page 1287, and it is found in the annotations, in which all of the leading cases are reviewed.

I have also examined a very informative article in 17 Ohio State Law Journal on what is a safe place to work. There, again, a number of cases are analyzed and referred to.

Counsel for the plaintiff in answer to my question yesterday conceded that this Court is bound by the decision of the Court of Appeals of Cuyahoga County, unless the Court should be able to distinguish that case.

The Court has made strenuous efforts to find some basis for distinguishing the *Young* case from the instant case, and I am rather sad to acknowledge that the Court has failed in that effort.

This plaintiff suffered a grievous injury. The Court has been impressed by his total lack of fear, and his honesty as a witness, and it has been impressed, too, by his intelligence.

The Court believes that Mr. Moreno represents an ideal type of workman, conscientious, does his work, loyal

to his employer, faithful to any task that is assigned to him.

Of course, you gentlemen realize that this motion has to be decided on the basis of the law as the Court finds the law to be or understands it to be, and my sympathy for Mr. Moreno cannot be an influence in that connection.

The plaintiff made clear to the Court yesterday in oral argument that he places no reliance upon the theory that the defendant should be held answerable for Mr. Moreno's injury on the principles obtaining under the rule of respondeat superior.

If that were the theory of the plaintiff, it would be appropriate for the Court to consider whether Mr. Nezbeth's acts were within the scope of his employment and in furtherance of the employer's business.

From the statements of counsel for the plaintiff it is crystal clear that this is an action based upon an alleged direct negligence of the employer.

The employer is alleged to have been negligent in not providing a foreman at Linndale Yard on the morning of November 26, 1954, who if present on the scene might have discovered Mr. Nezbeth's condition before he struck Mr. Moreno, and might have relieved him from duty.

There is no evidence that the defendant, through Mr. Kelley or any other agent, had any knowledge that Mr. Nezbeth had been drinking before he came to work, or that he went off the job and indulged in more drinking.

There is no evidence that the defendant through any of its agents had any knowledge that Mr. Nezbeth was accustomed to appear for and be at work under the influence of intoxicating liquor.

The evidence is that among his fellow-workers he had the reputation of sometimes—I think Mr. Moreno's exact

words were "from time to time"—Nezbeth would be on the job under the influence of liquor, and at such times—otherwise a fine, congenial gentleman—he would be a rough, vicious person.

Mr. Moreno did not say that he ever communicated that intelligence, such as he had, and there is no evidence that Mr. Moreno knew of the separate incidents which contributed to that reputation. He just knew that that was the reputation.

The Court is fully aware of the fact that the reviewing courts frown upon directed verdicts in F. E. L. A. cases; to say the least, they do not encourage them.

But this Court perceives that it is its duty to rule on this motion in accordance with its understanding of the law, without fear what the reviewing courts may ultimately do in this matter, and I hope it goes to the reviewing courts because I would like to see the decision I am about to give tested.

In the opinion of the Court the evidence fails to support the contention of the plaintiff that the New York Central Railroad was negligent in any respect.

On the authority of *Young versus New York Central Railroad*, 88 Ohio Appellate, page 352, the motion is granted and exception is saved to the plaintiff.

* * * * *